No. 89-1257



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

**VIRGINIA McMARTIN and PEGGY ANN BUCKEY,**
*Petitioners,*
*vs.*
**CHILDREN'S INSTITUTE INTERNATIONAL, and KATHLEEN "KEE" MACFARLANE,**
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

## PETITION FOR WRIT OF CERTIORARI

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PETITION FOR CERTIORARI

## QUESTION PRESENTED FOR REVIEW

Whether the California Child Abuse and Neglect Reporting Act, California Penal Code §§11164 et seq., provides complete immunity from liability for any and all claims arising under the Federal Civil Rights Act of 1871, 43 U.S.C. §1983, as alleged in Petitioners' First Amended Complaint?

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## OFFICIAL AND UNOFFICIAL REPORTS OF THE PROCEEDINGS IN THE COURTS BELOW

There have been two (2) published decisions on this case by the Court of Appeal of the State of California, Second Appellate District, Divisions One and Five:

1. McMartin v. County of Los Angeles, 202 Cal.App.3d 848, ___Cal.Rptr.___ (1988) [Division One]; and,

2. McMartin v. Children's Institute International, 212 Cal.App.3d 1393, ___Cal.Rptr.___ (1989) [Division Five].

In addition, there is an unpublished decision entitled McMartin v. ABC Television, Inc. and Wayne T. Satz by the Second District Court of Appeal, Division One, Appeal No. B032679, filed July 13, 1989. Those three decisions are

Items A, B and C respectively in the Appendix. [Appendix Items A and C deleted].

## JURISDICTIONAL STATEMENT

This Court has jurisdiction because the California State Court of Appeal has decided in a published decision, McMartin v. Children's Institute International, 212 Cal.App.3d 1393 (1989) and California Supreme Court has declined review thereof, an important question of federal civil rights law, granting absolute immunity from liability under the federal law. 42 U.S.C. §1983, for child abuse reporters as defined by California law, California Penal Code §11172(a), a part of the California Child Abuse and Neglect Reporting Act. Jurisdiction to decide such federal

questions on review from the final decision of the state's highest court is granted to this Court under 28 U.S.C. 1257.

## STATUTES AT ISSUE

California Penal Code §11172(a):

The relevant part of the California Child Abuse and Neglect Reporting Act, Penal Code §11172(a), is as follows [the complete text of the Act is in the Appendix, Item No. D]:

> "[Liability of persons making a report...] (a). No child care custodian, health practitioner, employee of a child protective agency, or commercial film and photographic print processor who reports a known or suspected instance of child abuse shall be civilly or criminally liable for any report required or authorized by this article."

42 U.S.C. §1983

42 U.S.C. §1983, reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in entity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

## STATEMENT OF THE CASE

This Petition seeks review of state court decisions dismissing Petitioners' federal civil rights claims on state statutory immunity grounds. All of Petitioners' state causes of action against Respondents were also dismissed and are not at issue on this Petition.

This was a state civil damage and declaratory relief suit following dismissal of state criminal charges against Petitioners alleging child abuse and molestation at the Virginia McMartin Preschool in Manhattan Beach, California, which was co-owned by Petitioner Virginia McMartin and at which her granddaughter, Petitioner Peggy Ann Buckey, was briefly a part-time teacher. Of the thirteen causes of action in the complaint, the second was for violation of civil rights under 42 U.S.C. 1983, and the third for conspiracy to violate such civil rights.

In essence, the pleading alleged that there was a loose knit alliance among the police, the District Attorney, Children's Institute International ("CII"), and ABC Television to set up and promote a

"major" child abuse case for their own benefit by staging and publicizing its discovery, investigation and prosecution, including creating or suppressing evidence where appropriate to their purposes. For example, the appointed District Attorney running for election for the first time received much needed public exposure, and the news reporter received accolades for his "scoops", which it turned out were actually the product of his romantic relationship with Kathleen "Kee" MacFarlane, the CII employee doing the actual interviewing of the alleged victims.

The criminal case began in 1983, amid widespread publicity at the beginning of an election campaign, with the arrest of another family member, Raymond Buckey,

grandson and brother of Petitioners respectively. Subsequently Petitioners and four other preschool teachers (Babette Spitler, Mary Ann Jackson, Betty Raidor, and Peggy McMartin Buckey) were arrested and charged with hundred of counts of alleged child molestation covering a period of several years. There followed at 18 months the longest preliminary hearing in history, after which all seven defendants were bound over for trial, but then five, including Petitioners here, were dismissed by a new District Attorney who had defeated the incumbent and announced there was no evidence to support the charges against these dismissed defendants. The two remaining criminal defendants, Peggy McMartin Buckey and her son Raymond

Buckey, were on trial from 1987 through January, 1990 when the jury returned a verdict of "Not Guilty" on 52 counts of child abuse, and then were hung on one joint count of conspiracy and twelve (12) counts only against Raymond Buckey. That remaining count was dismissed as to Mrs. Buckey and will be disposed of on January 31, 1990 as to him.

In March, 1986, Petitioners here filed their civil complaint, Case No C601854, in the Superior Court of the State of California, County of Los Angeles, and subsequently filed a First Amended Complaint. Defendants and Respondents Children's Institute International, and Kathleen "Kee" MacFarlane demurred to the complaint for failure to state a cause of action on any

theory. The Superior Court sustained the demurrers of Respondents without leave to amend and dismissed the entire case against them. Petitioners timely appealed the dismissal. and after briefing and oral argument, the appeal was decided by the California Second District Court of Appeal, Division Five, August 10, 1989, which affirmed the trial court in all material respects. A copy of that opinion published as McMartin v Children's Institute International, 212 Cal.App.3d 1393, ___Cal.Rptr.___ (1989) is in the Appendix as Item No. C [Deleted].

Petitioners then sought review in the Supreme Court of the State of California, which denied their Petition for Review by summary order and without opinion on

November 1, 1989. A copy of that order is Item No. G in the Appendix. Thereafter, in accordance with California law, the case was returned to the Second District Court of Appeal, whose remittitur issued on November 20, 1989 returning the case to the Superior Court. A copy of the Remittitur is in the Appendix as Item No. H.

## ARGUMENT

### I. INTRODUCTION

This case presents a clash of interests not uncommon to the law: the police, prosecutorial and public welfare powers of the state versus the individual's right to be free of unreasonable interference from the government and to be compensated therefor when it nonetheless occurs.

The State of California through its Legislature has determined that in order to uncover and remedy neglect, abuse and molestation of children, it is necessary and desirable to grant a generous immunity to those whose job it is to report such abuse, sometimes referred to in the literature as "mandated reporters." Indeed, such a mandated reporter can be criminally prosecuted for either failure to make a report of child abuse [Cal. Penal Code §11172 (e)], or a breach of confidentiality [§11167.5(a)]. These reporters include the police, doctors welfare workers, hospitals, child welfare agencies and their agents and employees. Cal. Penal Code §11165.7, 11165.8, 11165.9. It is undisputed for the purposes of the case below and this

Petition that Respondents generally qualify as mandated reporters under California law.

The dispute arises over whether there is any conduct engaged in under the guise of "reporting" which does not qualify and cannot be immune from a claim under federal civil rights law embodied in 42 U.S.C. §1983. The general subject matter of this case might be easily confused with another recent California case before this court for review, Schoenfield v. County of Humboldt 89-616, cert. denied January 22, 1990. There are significant distinctions however, in that Schoenfield was essentially a malicious prosecution case with some failure to train allegations asserted under §1983, in which the lower

federal courts never reached the immunity issue, and there were still claims alive in a state court action against the same defendants. McMartin, on the other hand, alleges and can prove specific types of traditionally recognized civil rights violations rather than a claim simply in the nature of wrongful prosecution, and this is the court of last resort for all of their state claims have been dismissed on immunity grounds as well.

More specifically, the First Amended Complaint here alleges (1) that these "reporters" were, in effect, unqualified, untrained and unsupervised public agency sub-contractors, initially of the City of Manhattan Beach, California's police department, and later the County of Los

Angeles, with respect to the investigation of a possible crime preceding the involvement of the County's prosecutor' (2) that the investigation was conducted in violation of state law, but pursuant to a local governmental policy to deliberately ignore Petitioners' rights in such a way as to produce fabricated evidence and then indictments which were intended to and did in fact inure to the personal advantage of the campaigning District Attorney, and to CII and its agent MacFarlane, among others; and, (3) that whereas a key element of the Child Abuse statute and the immunity is to promote and protect the confidentiality of the reports and reporters, the mandated reporters here did just the opposite and

publicized the "investigation" and proceedings, not only through press releases and public statement, but repeatedly through special leaks and clandestine arrangements between MacFarlane and her paramour, ABC Television newsman Wayne T. Satz.[1]

This allegedly immune activity was simply a conduit to broadcasting the confidential "report" on the ABC Evening News and an elaborate, although ultimately

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1 Both ABC and Satz are defendants in the underlying case. Their demurrer to the complaint on various grounds was sustained without leave to amend by the Superior Court, then reversed by the Second District Court of Appeal, Division One, on July 13, 1989, with a holding that claims could be stated against those two defendants based on the facts alleged for malicious prosecution and defamation. That decision is in the Appendix as Item No. G. Review of that decision was denied by the California Supreme Court on September 7, 1989.

unsuccessful, promotion for an election campaign.

In essence, the California Court of Appeal held that there was absolute immunity here, that nothing done in the course of the proceedings, investigative or otherwise, could be the basis of any claim for damages whatsoever, expressly including claims under federal civil rights law. Petitioners argued below and now here that such an immunity is unnecessary and too broad to survive review under federal civil rights standards, particularly recent decisions of the Ninth Circuit Court of Appeals dealing with prosecutorial immunity for investigations and publicity, and the decisions of this court regarding failure to train and supervise law enforcement

personnel who because of that shortcoming have injured citizens. See City of Canton, Ohio v. Harris, 489 U.S.___, 109 S.Ct. 1197, 1200-1202, 103 L.Ed.2d 412 (1989); and Berquist v. County of Cochise 806 F.2d 1364, 1369 (9th Cir. 1986).

II. THE DECISIONS OF THE CALIFORNIA COURT UPHOLDING ABSOLUTE IMMUNITY FOR RESPONDENTS ARE INCONSISTENT WITH THE DECISIONS OF THE FEDERAL CIRCUIT COURTS ON QUALIFIED IMMUNITY FOR CHILD WELFARE WORKERS

The scope of immunity available to Respondents is analogous to that of the prosecutor under Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), where this court held that a prosecutor was absolutely immune from

liability under 42 U.S.C. §1983 only for actions taken with the scope of the "prosecutorial duties", Id. at 420, and only for those activities which are, "intimately associated with the judicial phase of the criminal process." Id. at 430. Virtually all courts who have resolved questions involving immunities for social workers or child welfare workers have resorted to this analogy, finding these persons to be performing functions akin to that of an arm of the court. See, e.g., Meyers v. Contra Costa County, 812 F.2d 1154, 1155 (9th Cir.), cert. denied 484 U.S. 829, 108 S.Ct. 98, 98 L.Ed.2d 59 (1987); and Myers v. Morris, 810 F.2d 1437 (8th Cir.), cert. denied, 484 U.S. 828, 108 S.Ct. 97, 98 L.Ed.2d 58 (1987).

It should follow then that the same rules apply as to the limits on such immunity, i.e., that it is absolute with respect to the judicial or prosecutorial phase, and qualified otherwise. For example, a recent decision of the 10th Circuit notes that all courts who had considered the issue of extra-judicial statements by the prosecutor about pending matters, had reached the same result, citing cases from the Second, Fifth, Seventh and Ninth Circuits:

> "In those circuits which have directly addressed the question, a prosecutor's statements to the press have been consistently considered as a part of the prosecutor's administrative function, only entitling the prosecutor to qualified immunity. (Citations omitted.): England v. Hendricks, 880 F.2d 281, 285 (10th cir. 1989).

The Ninth Circuit decision cited in England is very explicit on the overpublicizing-the-case rubric, and was explicitly relied on by Petitioners in arguing their case below (see, for example, their Petition for Review before the California Supreme Court, at pages 6 and 15, Item No. F in the Appendix hereto), under the heading,

> "B. False Statement to News Media";
>
> "The district court appears to have held that this false statement claim fell within the scope of prosecutorial immunity because the 'publicity of sting operations serves as a substantial crime deterrent.' This ruling was in error.
>
> "Gobel and DeFranco correctly contend that a prosecutor's public statements regarding criminal proceedings are not protected by absolute immunity because they are not quasi-judicial acts. (Citations omitted." Gobel v. Maricopa County, 867 F.2d 1201, 1205 (9th Cir. 1989).

See also, DiMartini v. Ferrin, 889 F.2d 922, 927 (9th Cir. 1989).

Logically and as a matter of common sense, if the prosecutor ballyhooing his prosecution before the media is not absolutely immune for that performance, how can one say that Kathleen "Kee" MacFarlane's pillow talk leaks of inside information on confidential proceedings to her lover for scoops and publication on the evening news is entitled to absolute protection? Indeed, although this precise issue has not been resolved in the 9th Circuit, it has been raised and left open for further developments such as this case. For example, in Baker v. Racansky, 887 F.2d 183, 190 (9th Cir. 1989), the court, while upholding a child welfare worker's claim

of immunity, expressly reserved judgment on whether a certain amount of "egregious conduct" might constitute a §1983 violation. Petitioners submit that the rampage against them in the state courts is that egregious conduct.

## CONCLUSION

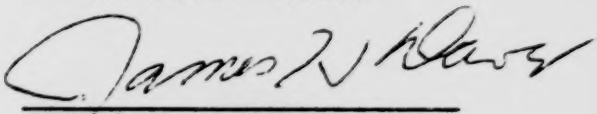
Petitioners respectfully request this Court to grant review of the decision of the California State courts holding that a person qualifying as a mandated reporter under the California Child Abuse and Neglect Reporting Act is absolutely immune from liability under 42 U.S.C. §1983, even for injuries resulting from the incompetence of untrained and unsupervised police type investigative workers who publicized for personal gain that which their statutory immunity was

designed to keep confidential, and they were were required by law to keep confidential.

Respectfully submitted

DATED: Jan. 29, 1990

JAMES H. DAVIS,
A LAW CORPORATION



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# APPENDIX B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

| | | |
|---|---|---|
| VIRGINIA MCMARTIN and PEGGY ANN BUCKEY, Plaintiffs and Appellants, v. CHILDREN'S INSTITUTE INTERNATIONAL, KATHLEEN "KEE" MCFARLANE, ABC TELEVISION, INC., and WAYNE SATZ, Defendants and Respondents. | ) | B031360 (Super.Ct.No. C601854) COURT OF APPEAL-SECOND DIST. F I L E D Aug 10 1989 ROBERT N. WILSON Clerk |

APPEALS from a judgment of the Superior Court of Los Angeles County. Kurt J. Lewin, Judge. Affirmed.

James H. Davis for Plaintiffs and Appellants.

O'Melveny & Myers, Charles P. Diamond, David Pettit and Jonathan B. Frank for Defendants and Respondents.

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Plaintiffs Virginia McMartin and Peggy Ann Buckey appeal from an order sustaining a demurrer to their first amended complaint without leave to amend and dismissing their action against defendants Kathleen "Kee" MacFarlane and the Children's Institute International for damages allegedly arising out of the investigation and prosecution of a criminal child abuse action. We affirm the judgment (order of dismissal).

FACTS

In their First Amended Complaint, plaintiffs named the County of Los Angeles ("County"), the City of Manhattan Beach ("City"), Children's Institute International ("CII"), Kathleen "Kee" MacFarlane ("MacFarlane"), Astrid Hager, Bruce Woodling, Robert Philbosian, Wayne

Satz, ABC Television Inc. and Does 1 through 200 in an action for:

"1. Breach of a Rule of Law;

"2. Violation of Civil Rights (42 U.S.C. 1983);

"3. Conspiracy to Violate Civil Rights;

"4. Declaratory Relief--Comparative Equitable Indemnity;

"5. RICO 918 [sic] U.S.C. 1961);

"6. Breach of Mandatory Duty by District Attorney (Prosecu- [sic];

"7. Intentional Infliction of Emotional Distress;

"8. Defamation;

"9. Outrageous Conduct by a [sic]

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"10. Television Station;[1/]

"11. Battery;

"12. Interference with Prospective Advantage;

"13. Negligent Infliction of Emotional Distress."

The complaint sought to recover monetary damages and declaratory relief for the emotional, physical and economic harm suffered by plaintiffs allegedly stemming from the prosecution of criminal charges against plaintiffs for child abuse allegedly occurring at the McMartin Preschool in the City of Manhattan Beach.

This action only involves the demurrer brought by defendants CII and

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1. The tenth cause of action is, in reality, for invasion of privacy.

MacFarlane, who are named as defendants in every cause of action except the sixth,

"Breach of Mandatory Duty by District Attorney" and the ninth. "Outrageous Conduct by a Television Station -- Media Malpractice."

The facts pleaded by plaintiffs in their First Amended Complaint to support their claims of wrongdoing against defendants were as follows: 2/

(1) That CII was retained by the City of Manhattan Breach and the County of Los Angeles "to interview, examine, interrogate and evaluate the alleged victims of child abuse, and to report to

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2. In determining the propriety of the trial court's ruling sustaining defendants' demurrer, we must accept as true those facts properly pleaded in the complaint. (Jones v. Grewe (1987) 189 Cal.App.3d 950, 954.)

(the) City and County whether child abuse had occurred and who the perpetrators were";

(2) That CII was acting through its duly authorized officers and agents, including defendant MacFarlane;

(3) That CII reported to the City and County its conclusions that numerous acts of child abuse had occurred at the McMartin Preschool, and that plaintiffs, among others, were perpetrators or probable perpetrators thereof, although CII had no contact with plaintiff nor specific knowledge about plaintiffs at the time such report was made;

(4) That CII violated substantially all standards for interviewing alleged child abuse victims;

(5) That CII's therapists engaged in these improper activities because it was to their personal advantage to do so;

(6) That as a result of CII's conduct, plaintiffs were wrongfully indicted and subjected to a preliminary hearing on charges of child abuse.

(7) That MacFarlane "leaked" testimony and documentary evidence which was subject to protective orders in the criminal proceedings to ABC Television Inc. and its news reporter Wayne Satz; and

(8) That MacFarlane and others suppressed, destroyed and manipulated "evidence such as that discrediting the mental stability and veracity of Judy Johnson, the initial complaining witness against plaintiff in 1983."

Defendants CII and MacFarlane filed their demurrer to the First Amended Complaint in September 1987 on the grounds that (1) plaintiffs' state law claims were barred under the absolute privilege of Penal Code section 11172; (2) plaintiffs' state law claims were barred because CII's reports were made in connection with an ongoing criminal investigation and were thus privileged (Civ.Code,Section 47(2)); (3) plaintiffs' civil rights and conspiracy causes of action were barred by CII's absolute federal immunity; (4) plaintiffs failed to state a cause of action under RICO; and (5) plaintiffs failed to state a cause of action for declaratory relief.

DISCUSSION

I

1. Child Abuse Reporter Immunity

Pursuant to Penal Code section 11166, "any child care custodian, health practitioner, or employee of a child protective agency who has knowledge of or observes a child in his or her professional capacity or within the scope of his or her employment whom he or she knows or reasonably suspects has been the victim of child abuse shall report the known or suspected instance of child abuse to a child protective agency. . . ." 3/ (Pen. code, Section 11166,

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3. A "child protective agency" is defined as "a police or sheriff's department, a county probation department, or a county welfare department. It does not include a school district police or security department." (Pen.Code, Section 11165.9.)

subd.(a).) The failure to report is a misdemeanor, punishable by up to six months in jail or by a fine of $1000, or both. Pen.Code, Section 11172, subd. (e).) Those subject to this mandatory reporting requirement are absolutely immune from civil or criminal liability for making such a report. (Pen.Code, Section 11172, subd. (a); [4/] Storch v. Silverman (1986 186 Cal.App.3d 671.) Thus, even if an individual designated as a mandated reporter pursuant to section 11166 submits a false report with the

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4. Section 11172 provides in relevant part that: "No child care custodian, health practitioner, employees of a child protective agency, or commercial film and photographic print processor who reports a known or suspected instance of child abuse shall be civilly or criminally liable for any report required or authorized by this article. . . ."

intent to vex, annoy or harass an innocent party, civil or criminal liability cannot be imposed. (Id. at p. 681; Krikorian v. Barry (1987) 196 Cal.App.3d 1211, 1217-1218.)

Members of the general public who voluntarily report incidences of child abuse are also protected by section 11172, but their immunity from civil or criminal liability is not absolute. They are not protected if they make a report with knowledge of its falsity or with reckless disregard of its truth or falsity. (Pen. Code, Section 11172, subd.(a).) "'The limitation on the immunity for false or negligent reports is necessary to prevent a vindictive former spouse or neighbor from making a knowingly false report.' (State Bar of Cal., Rep. on Assem.

No.2497 (1979-1980 Req. Sess.) p.2)" (Storch v. Silverman, supra, 186 Cal. App. 3d at p. 680.)

Defendant CII, as identified in the complaint, is "a California non-profit corporation which holds itself out to the public as an independent, professional and objective organization that is expert at the task of assessing whether in fact child abuse has occurred, the nature thereof and the identity (sic) of the perpetrator" and MacFarlane is identified as its duly authorized officer and agent. While these descriptions do not specifically identify CII or MacFarlane as "child care custodians," plaintiffs do not quarrel that CII comes within the category of mandated reporters under section 11166, nor that MacFarlane is CII's employee.

Plaintiffs acknowledge the broad scope of the immunity granted by Penal Code section 11172, but contend that the activities of defendants which caused them harm were outside the scope of protected child abuse reporting, and that they should be allowed to amend their complaint to plead such facts. Plaintiffs, however, failed to bring before the trial court and have failed to bring before this court any such facts.

At oral argument on the demurrer, plaintiffs claimed they would amend to plead MacFarlane's lack of a child care license. Even assuming this were true, this fact alone does not remove MacFarlane from the category or mandated reporters. A "child care custodian" protected under section 11172 may be an employee of a

licensed community care or child day care facility or a child care institution. (Pen. Code, Section 11165.7.) In addition, the inclusion of "commercial film and photographic print processors" and "employees of child protective agencies" in the category of mandated reporters in Penal code section 11166 clearly indicates that a child care license is simply not a prerequisite for the shield of immunity provided by section 11172.

The protection granted by section 11172 encompasses not only the actual act of reporting, but also "conduct giving rise to the obligation to report, such as the collection of data, or the observation, examination, or treatment of the suspected victim or perpetrator of

child abuse, performed in a professional capacity or within the scope of employment. . . ." (Krikorian v. Barry, supra, 196 Cal.App 3d at pp. 1222-1223.) Based on the scenario provided by plaintiffs' complaint, we can find no other facts which would take defendants' alleged activities outside the scope of the privilege. Plaintiffs' complaint specifically alleges that CII was retained to interview, examine and interrogate the children from the McMartin Preschool. Activities occurring prior to the actual filing of criminal charges against plaintiffs would be privileged since the complaint specifically alleges that CII's involvement commenced upon its hiring by the City of Manhattan Beach and the County of Los Angeles.

Even if, as plaintiffs allege, CII and MacFarlane used unorthodox methods in interviewing the children, defendants are not removed from the protection afforded them by section 11172. The manner in which the alleged child abuse is discovered is irrelevant as long as the discovery occurs within the scope of the interviewing observing reporters' employment or in their professional capacity as children's services providers. (Krikorian v. Barry, supra, 196 Cal.App.3d at p. 1223.)

Finally, plaintiffs contend on appeal that MacFarlane's activities in her romantic relationship with ABC television reporter and codefendant, Wayne Satz, remove defendants from the scope of the privilege afforded them. None of their

allegations regarding MacFarlane and Satz, however, form the basis of the causes of action relevant to our discussion here regarding the privilege of section 11172.[5/] The trial court sustained the demurrer on the grounds of this privilege as to the first ("Breach of a Rule of Law"), seventh ("Intentional Infliction of Emotional Distress"), eighth

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5. As a basis for their fifth cause of action for violation of 18 United States Code section 1961 ("RICO") plaintiffs claim that MacFarlane transmitted information to Satz in defiance of court orders and suppressed unspecified evidence. As discussed infra, the RICO cause of action is insufficiently pled despite these allegations. Further allegations regarding the MacFarlane-Satz relationship are contained in paragraph 49 of the First Amended complaint, which is only directed towards establishing a cause of action against ABC Television and Satz, not CII or MacFarlane.

("Defamation"), tenth ("Invasion of Privacy"), eleventh ("Battery"), twelfth ("Interference with Prospective Advantage") and thirteenth ("Negligent Infliction of Emotional Distress") causes of action. It is clear that all of these causes of action, except the eleventh cause of action (battery), are based upon activities protected by section 11172 and, therefore, no liability could attach to these defendants on any of the claims theories set forth therein.

Plaintiffs' eleventh cause of action for battery would be the only cause of action that could survive, since it is clearly based on activities which are outside the scope of the privilege of

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Penal Code section 11172. 6/ However, at oral argument, before this court, plaintiffs indicated that they have abandoned this theory of recovery and have, since filing the instant appeal, withdrawn this cause of action from subsequently filed amended complaints. For these reasons this court will not issue its order preserving the eleventh cause of action.

2. Waiver of Immunity

Although plaintiffs claim that

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6. Plaintiffs claim that: "Beginning in 1984 and continuing periodically thereafter up to dismissal in 1986 of the criminal charges against Plaintiff, Plaintiff has pushed, shoved, kicked and also hit and tripped by agents and employees of Defendants and persons under Defendants' control from who Defendants had a duty to protect Plaintiff while Plaintiff was in Defendants' custody and control but failed to do so."

defendants waived the privilege of Penal Code section 11172 in an interview on the television program "60 Minutes," upon examination of the transcript provided us, we find no such waiver in the comments made in the interview. 7/ Plaintiffs failed to specify in which part of the interview the waiver occurred, merely referring to the entire transcript of the program. The only instance in which the waiver could have arguably been made consisted of the following statements between the program's moderator, Mike Wallace, and Ms. Emmons, apparently the

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7. The alleged waiver was not mentioned in Plaintiffs' First Amended Complaint at all, but was raised in their opposition to CII's and MacFarlane's demurrer.

executive director of CII, but not a named defendant:

"WALLACE: But as far as your procedures were concerned, as far as the information that you've gotten on these videotapes, you have no doubt that it's good, accurate information and will stand up in court and should stand up in court?

"MS. EMMONS: Mike, the procedures that we used were designed to provide treatment to the children that came here. They were not designed for a court of law."

All that these statements indicate is that the treatment given to the children at CII was without regard to whether charges would be brought against plaintiffs. The reporting laws clearly contemplate that child care organizations such as CII would become aware of

potential child abuse in the normal course of business. (Krikorian v. Barry, supra, 196 Cal.App.3d at p. 1223.) The subsequent reporting of these activities becomes protected whether or not the discovery was made in anticipation of prosecution of child abuse charges.

4. Declaratory Relief

Plaintiffs' fourth cause of action for "Declaratory Relief--Comparative Equitable Indemnity" seeks a declaration of defendants' rights and liabilities with respect to damages plaintiffs may be required to pay in the civil lawsuits brought by parents and/or legal guardians of former students of the McMartin Preschool. Plaintiffs contend that despite the immunity from damages afforded to CII and MacFarlane, plaintiffs may

still obtain a declaration of their liability.

Plaintiffs seek contribution for the monetary damages which they may be ordered to pay. We fail to see, however, given the immunity granted by section 11172, how such statutory law can be faithfully applied were the court able to declare defendants liable for monetary damages in circumstances where actual liability for the conduct alleged could not be enforced.

Here, all the First Amended Complaint alleges is that "Defendants are primarily liable because of their active and intentional misconduct which was the proximate cause of such damages through the purported child abuse investigation, and the publicity attendant thereto which was staged, created and manipulated by the

ABC Defendants." Plaintiffs offer no facts which elaborate, specify or provide a basis for their claims that defendants could now be held liable for activity other than that statutorily mandated by section 11166. Under the facts alleged here, defendants are immune from civil liability under the state law theories set forth, excluding the now-withdrawn claim for battery. Plaintiffs, therefore, cannot be afforded the opportunity of attempting to recover against these defendants through the "back door" of equitable indemnity for damages proven to have been suffered by third persons for which plaintiffs are found responsible.

Plaintiffs argue that Lezama v. Justice Court (1987) 190 Cal.App.3d 15 and Pulliam v. Allen (1984) 466 U.S. 522

provide that declaratory relief is still available despite the existence of a statute providing immunity from damages. Their reading of these cases is overly broad. Both Lezama and Pulliam dealt with the narrow issue of the availability of the remedies of prospective injunctive relief and attorney fee awards against judicial officers and are not appropriate precedent for the matter in issue here.

II

Having thus decided that plaintiffs are barred from relief on their first, fourth, seventh, eighth, tenth, twelfth, and thirteenth causes of action by the absolute privilege of Penal Code section 11172, we must now consider the propriety of the trial court's ruling sustaining the demurrer to the remaining causes of action

asserted against these defendants (Franchise Tax Board v. Firestone Tire & Rubber Co. (1978) 87 Cal.App.3d 878, 883; Carney v. Rotkin, Schmerin & McIntyre (1988) 206 Cal.App.3d 1513, 1524), especially since the trial court's minute order indicated only that the demurrer was sustained "on the grounds set forth in the demurring papers. . . ."

1. Civil Rights Violations

In their second cause of action, plaintiffs plead a violation of 42 United State Code section 1983. [8/] Their

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8. 42 United States Code section 1983 provides that "Every person" who, under color of state law or custom, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured . . ."

primary allegation consists of the following;

"Specifically, Plaintiff alleges that . . . each of the Defendants, acted under color of state law, as a matter of governmental policy of CITY and COUNTY, recklessly and in a gross and negligent manner, and with deliberate indifference towards Plaintiff's rights, privileges, and immunities, and filed [sic] to protect Plaintiff with procedural due process, inflicted cruel and unusual punishment upon Plaintiff while in Defendants' custody and control and failed to follow Defendants' own statutory and regulatory requirements designed to protect plaintiff as required by law and as comparable to that which Defendants made available to

other similarly situated persons within Defendants' jurisdiction."

Child services social workers are entitled to absolute immunity in performing quasi-prosecutorial functions such as initiating and pursuing dependency petitions in cases of suspected child abuse or neglect. (Meyers v. Contra Costa County (9th Cir. 1987) 812 F.2d 1154, 1157, cert. denied ___ U.S.___, 108 S.Ct. 98 (1987).) "Although child services workers do not initiate criminal proceedings, their responsibility for bringing dependency proceedings, and their responsibility to exercise independent judgment in determining when to bring such proceedings, is not very different from the responsibility of a criminal prosecutor. The social worker must make a

quick decision based on perhaps incomplete information as to whether to commence investigations and initiate proceedings against parents who may have abused their children. The social worker's independence, like that of a prosecutor, would be compromised were the social worker constantly in fear that a mistake could result in a time-consuming and financially devastating civil suit. (Id. at p. 1157.)

Defendants' activities in interviewing and observing the children and reporting their observations to the authorities were, likewise, quasi-prosecutorial functions within the scope of their authority and were required by state law. (Schlegel v. Debout (9th Cir. 1988) 841 F.2d 937, 943-944; cf.

Coverdell v. Dept. of Social & Health Services (1987) 834 F.2d 758, 764.) Thus, they are entitled to immunity from claims made under 42 United States Code section 1983. (Ibid.)

Plaintiffs contend this absolute prosecutorial immunity does not apply because (1) defendants were acting pursuant to their employment by the police department, not the District Attorney's office; (2) plaintiffs can amend to show acts which occurred before and after the prosecutorial activity which caused the harms; and (3) MacFarlane's relationship with Satz does not fall within the ambit of prosecutorial activity.

As defendants point out, however, the complaint alleges only that defendants' role in contributing to the injury

complained of was their advice to the District Attorney that criminal charges should be brought. Moreover, plaintiffs have failed to demonstrate, by proposed amendments to their pleadings, their briefs or in oral argument, that other facts or circumstances exist, either prior to or after the defendants' alleged prosecutorial conduct, that would deny defendants the protection of the immunity provided for such legally sanctioned activity (cf. Coverdell v. Dept. of Social & Health Services, supra, 834 F.2d at p. 762, n. 3); nor are there any facts alleged to show that MacFarlane's relationship with Satz was "under color of state law" so as to render her liable under 42 United States Code section 1983.

2. Conspiracy

Plaintiffs' third cause of action for "Conspiracy to Violate Civil Rights" alleges that Defendants "agreed and conspired to associate for the purposes of violating Plaintiff's [sic] civil rights under the laws and Constitutions of the State of California and the United States by whatever means, whether legal or illegal, available to the Defendants."

Plaintiffs maintain that this cause of action is a "state civil conspiracy claim," but that "the wrongful act alleged happens to be a federal civil rights violation."

Plaintiffs also contend that they could amend the First Amended Complaint to allege "a violation of similar state civil rights laws, e.g. the constitutional right to privacy." No such request was made at

the hearing on defendants' demurrer, and no facts have been offered which would support these allegations.

As discussed herein, the complaint, even with the offered "amendments" will not support either the state law claims pled or the federal civil rights claim under 42 United States Code section 1983. A conspiracy cannot be alleged as a tort separate from the underlying wrong it is organized to achieve. (Citizens Capital Corp. v. Spohn (1982) 133 Cal. App. 3d 887, 889.) As long as the underlying wrongs are subject to privilege, defendants cannot be held liable for a conspiracy to commit those wrongs. Acting in concert with others does not destroy the immunity of defendants. (Hardy v.

Vial (1957) 48 Cal. 2d 577, 583-584; see Krikorian v. Barry, supra, 196 Cal.App. 3d at p. 1214.)

4. RICO

The trial court sustained the demurrer to plaintiffs' fifth cause of action for violation of 18 United States Code sections 1961 et seq. ("RICO") for its failure to adequately plead the elements of "pattern," "enterprise," and "racketeering activity." 9/

The RICO statutes require that a plaintiff plead and prove: (1) conduct (2)

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9. In their demurrer, CII and MacFarlane simply referred the trial court's prior ruling sustaining a demurrer by codefendants ABC Television Inc. and Wayne Satz on the same cause of action. As noted earlier, the trial court's minute order on the CII and MacFarlane demurrer stated only that the motion was granted on the grounds set forth in the moving papers.

of an enterprise (3) through a pattern (4) of racketeering activity. (Sedima, S.P.R.L. v. Imrex Co. (1985) 473 U.S. 479, 496.) State courts have concurrent jurisdiction with federal courts over these claims. (Cianci v. Superior Court (1985) 40 Cal. 3d 903, 909.)

"Racketeering activity" is defined in 18 United States Code section 1961 as any of a number of specifically enumerated acts. The "racketeering activity" which plaintiffs allege as the basis for their RICO claims is "the obstruction of justice." Title 18 United States Code section 1503, the obstruction of justice statute specifically referred to in the section 1961 definition of racketeering activity, pertains however, only to federal actions. (U.S. v. Baker (6th

Cir. 1984) 494 F. 2d 1262, 1265.) Since the acts alleged by plaintiffs relate only to a state criminal prosecution, section 1503 does not apply. Because there is no other activity alleged which constitutes racketeering activity under section 1961, plaintiffs' RICO cause of action is deficient.

Plaintiffs argue in their opening brief that leave to amend should have been granted, especially in light of Unocal Corp.v. Superior Court (1988) 198 Cal. App. 3d 1245, a now depublished opinion. 10/ Plaintiffs maintain that they propose to further amend their complaint

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10. The opinion was decertified for publication on June 2, 1988, after the opening brief had been filed; however, no references were made to the RICO cause of action at all in plaintiffs' reply brief, filed August 8, 1988.

by alleging instances of mail fraud, "e.g. there was a mailing with regard to appellants and CII's activities sent out by the Manhattan Beach Police Department before there was a prosecution; and there were subsequent uses of the mail to establish arguably fraudulent claims, at CII's instigation, for compensation from the state for the alleged victims of appellants' alleged child abuse."

In pleading a violation of the mail fraud statute (18 U.S.C., Section 1341) as a predicate act under a RICO scheme, plaintiffs must allege that (1) defendants devised a scheme or artifice to defraud, (2) defendants used the mails in furtherance of the scheme, and (3) defendants did so with the specific intent

to deceive or defraud. (Sun Sav. and Loan Ass'n. v. Dierdorff (9th Cir. 1987) 825 F.2d 187, 195.) The first amendment proposed by defendants to their RICO cause of action clearly involves an act by the Manhattan Beach Police Department and does not meet any of the necessary criteria of mail fraud. The second proposed amendment seems to suggest that CII encouraged parents to use the mails in making claims for compensation from the state for the abuse allegedly suffered by their children. Besides failing to meet the requirement of pleading specific intent, this claim states no resultant damage to plaintiffs and at most suggests, as defendants point out, a fraud upon the State of California, a wrong which plaintiffs have no standing

to prosecute. (Sedima, S.P.R.L. vs. Imrex, supra, 473 U.S. at pp. 496-497--Under 18 United States Code section 1962(c) "a plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation."; Old Time Enterprises vs Intern. Coffee Corp. (5th Cir. 1989) 862 F.2d 1213, 1219--Complaint dismissed for failure to allege facts showing the requisite nexus between the claimed RICO violations and plaintiffs' damages.)

Further compounding the problems with plaintiffs' RICO cause of action is their failure to specifically plead the time, place or nature of the alleged communications constituting racketeering

activity. (Alan Neuman Productions Inc. v. Albright (9th Cir.1988) 862 F.2d 1388, 1392.) No effort was made by plaintiffs to allege any specific facts in this regard. We find the trial court properly sustained defendants' demurrer without leave to amend as to this cause of action.

III

Plaintiffs claim that whatever the deficiencies in their First Amended Complaint, they should have been allowed leave to amend.

On appeal of an order sustaining a demurrer, the burden is on the plaintiff to show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. (Goodman v. Kennedy (1976) 18 Cal.3d 335, 349.) No proposed amendment to this

action was offered in plaintiffs' opposition to the demurrer of CII and MacFarlane. At the hearing of this matter, plaintiffs' counsel indicated that if allowed to amend, he would add allegations that defendant MacFarlane was not licensed as a child care professional, purportedly to demonstrate that the type of activity and conduct undertaken by CII and MacFarlane was outside the scope of the privilege. As we have indicated, this fact would not have cured the many deficiencies in the First Amended Complaint. In addition, even the amendments proposed in their briefs are merely conclusory and not supported by any factual allegations.

We affirm the granting of the demurrer without leave to amend as to all

causes of action especially since plaintiffs made no offer in their briefs to allege facts establishing any of the other elements which we have deemed essential to their causes of action and neither the record nor the tenor of their briefs or oral argument indicates any ability on their part to plead or prove any such facts. (Goodman v. Kennedy, supra, 18 Cal.3d 335,350.)

DISPOSITION

The judgment (order of dismissal) is affirmed. The parties are to bear their own costs on appeal.

CERTIFIED FOR PUBLICATION

ROWEN, J*

We concur:

LUCAS, P.J.

ASHBY, J.

*Assigned by the Chairperson of the Judicial Council.

# APPENDIX D

## ARTICLE 2.5. CHILD ABUSE AND NEGLECT REPORTING ACT

Section

§11165. Child

As used in this article "child" means a person under the age of 18 years.

§11165.1. Sexual abuse; sexual assault; sexual exploitation

As used in this article, "sexual abuse" means sexual assault or sexual exploitation as defined by the following:

(a) "Sexual assault" means conduct in violation of one or more of the following sections: Section 261 (rape), 264.1 (rape in concert), 285 (incest), 286 (sodomy), subdivisions (a) or (b) of Section 288 (lewd or lascivious acts upon a child under 14 years of age), 288a (oral copulation), 289 (penetration of a genital or anal opening by a foreign object), or 647a (child molestation).

(b) Conduct described as "sexual assault" includes, but is not limited to, all of the following:

(1) Any penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or not there is the emission of semen.

(2) Any sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person.

(3) Any intrusion by one person in to the genitals or anal opening of another person, including the use of any object for this purpose, except that, it does not include acts performed for a valid medical purpose.

(4) The intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs and buttocks) or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or

gratification, except that, it does not include acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed by a valid medical purpose.

(5) The intentional masturbation of the perpetrator's genitals in the presence of a child.

(c) "Sexual exploitation" refers to any of the following:

(1) Conduct involving matter depicting a minor engaged in obscene acts in violation of Section 311.2 (preparing, selling, or distributing obscene matter) or subdivision (a) of Section 311.4 (employment of minor to perform obscene acts).

(2) Any person who knowingly promotes, aids, or assists, employs, uses, persuades, induces, or coerces a child, or any person responsible for a child's welfare, who knowingly permits or encourages a child to engage in, or assist others to engage in, prostitution or a live performance involving obscene sexual conduct or to either pose or model alone or with others for purpose of preparing a film, photograph, negative, slide, drawing, painting, or other pictorial depiction, involving obscene sexual conduct. For the purpose of this section, "person responsible for a child's welfare" means a parent, guardian, foster parent, or a licensed administrator or employee of a public or private residential home,

residential school, or other residential institution.

(3) Any person who depicts a child in, or who knowingly develops, duplicates, prints, or exchanges, any film, photograph, video tape, negative, or slide in which a child is engaged in an act of obscene sexual conduct, except for those activities by law enforcement and prosecution agencies and other persons described in subdivision (c) and (e) of Section 311.3.

§11165.2. Neglect; severe neglect; general neglect

As used in this article, "neglect" means the negligent treatment or the maltreatment of a child by a person responsible for the child's welfare under circumstances indicating harm or threatened harm to the child's health or welfare. The term includes both acts and omissions on the part of the responsible person.

(a) "Severe neglect" means the negligent failure of a person having the care or custody of a child to protect the child from severe malnutrition or medically diagnosed nonorganic failure to thrive. "Severe neglect" also means those situations of neglect where any person having the care or custody of a child willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered, as proscribed by Section 11165.3, including the intentional

failure to provide adequate food, clothing, shelter, or medical care.

(b) "General neglect" means the negligent failure of a person having the care or custody of a child to provide adequate food, clothing, shelter, medical care, or supervision where no physical injury to the child has occurred.

For the purposes of this chapter, a child receiving treatment by spiritual means as provided in Section 16509.1 of the Welfare and Institutions Code or not receiving specified medical treatment for religious reasons, shall not for that reason alone be considered a neglected child. An informed and appropriate medical decision made by parent or guardian after consultation with a physician or physicians who have examined the minor does not constitute neglect.

§11165.3. Willful cruelty or unjustifiable punishment of a child

As used in this article, "willful cruelty or unjustifiable punishment of a child" means a situation where any person willfully causes or permits any child to suffer, or inflicts thereon, unjustifiable physical pain or mental suffering or having the care or custody of any child, willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered.

§11165.4. Unlawful corporal punishment or injury

As used in this article, "unlawful corporal punishment or injury" means a situation where any person willfully inflicts upon any child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition. It does not include an amount of force that is reasonable and necessary for a person employed by or engaged in a public school to quell a disturbance threatening physical injury to person or damage to property, for purposes of self-defense, or to obtain possession of weapons or other dangerous objects within the control of the pupil, as authorized by Section 49001 of the Education Code. It also does not include the exercise of the degree of physical control authorized by Section 44807 of the Education Code.

§11165.5. Abuse in out-of-home care

As used in this article, "abuse in out-of-home care" means a situation of physical injury on a child which is inflicted by other than accidental means, or of sexual abuse or neglect, or unlawful corporal punishment of a child, as defined in this article, where the person responsible for the child's welfare is a licensee, administrator, or employee of any facility licensed to care for children, or an administrator or employee of a public or private school or other institution or agency.

§11165.6. Child abuse

As used in this article, "child abuse" means a physical injury which is

inflicted by other than accidental means on a child by another person. "Child abuse" also means the sexual abuse of a child or any act or omission proscribed by Section 273a (willful cruelty or unjustifiable punishment of a child) or 273d (unlawful corporal punishment or injury). "Child abuse" also means the neglect of a child or abuse in out-of-home care, as defined in this article. "Child abuse" does not mean a mutual affray between minors.

11165.7. Child care custodian

(a) As used in this article, "child care custodian" means a teacher; an instructional aide, a teacher's aide, or a teacher's assistance employed by an public or private school, who has been trained in the duties imposed by this article, if the school district has so warranted to the State Department of Education, a classified employee of any public school who has been trained in the duties imposed b y this article, if the school has so warranted to the State Department of Education; an administrative officer, supervisor of child welfare and attendance, or certificated pupil personnel employee of any public or private school; an administrator of a public or private day camp; a licensee, an administrator, or an employee of a licensed community care or child day care facility; headstart teacher; a licensing worker or licensing evaluator; public assistance worker; an employee of a child care institution including, but not

limited to, foster parents, group home personnel and personnel of residential care facilities; a social worker or a probation officer or any person who is an administrator or presenter of, or a counsel in, a child abuse prevention program in any public or private school/.

(b) Training in the duties imposed by this article shall include training in child abuse identification and training in child abuse reporting. As part of that training, school districts shall provide to all employees being trained a written copy of the reporting requirements and a written disclosure of the employees' confidentiality rights.

(c) School districts which do not train the employees specified in subdivisions (a) in the duties of child care custodians under the child abuse reporting laws shall report to the State Department of Education the reasons why this training is not provided.

§11165.8. Health practitioner

As used in this article, "health practitioner" means a physician and surgeon, psychiatrist, psychologist, dentist, resident, intern, podiatrist, chiropractor, licensed nurse, dental hygienist, optometrist, or any other person who is currently licensed under Division 2 (commencing with Section 500) of the Business and Professions Code; a marriage, family and child counselor; any emergency medical-technician I or II, paramedic, or other person certified pursuant to Division 2.5 (commencing with

Section 1797) of the Health and Safety Code; a psychological assistant registered pursuant to Section 2913 of the Business and Professions Code; a marriage, family and child counselor trainee, as defined in subdivision (c) of Section 4980.03 of the Business and Professions Code; and unlicensed marriage, family and child counselor intern registered under Section 4980.44 of the Business and Professions Code; a state or county public health employee who treats a minor for venereal disease or any other condition; a coroner; or a religious practitioner who diagnoses, examines, or treats children.

§11165.9. Child protective agency

As used in this article, "child protective agency" means a police or sheriff's department, a county probation department, or a county welfare department. It does not include a school district police or security department.

§11165.10. Commercial film and photographic print processor

As used in this article, "commercial film and photographic print processor" means any person who develops exposed photographic film into negatives, slides, or prints, or who makes prints from negatives or slides, for compensation. The term includes any employee of such a person; it does not include a person who develops film or makes prints for a public agency.

§11165.11. Licensing agency

As used in this article, "licensing agency" means the State Department of Social Services office responsible for the licensing and enforcement of the California Community Care Facilities Act (Chapter 3 (commencing with Section 1500) of Division 2 of the Health and Safety Code), the California Child Day Care Act (Chapter 3.4 (commencing with Section 1596.70) of Division 2 of the Health and Safety Code), and Chapter 3.5 (commencing with Section 1596.90) of Division 2 of the Health and Safety Code), or the county licensing agency which has contracted with the state for performance of those duties.

§11165.12. Unfounded report

As used in this article, "unfounded report" means a report which is determined by a child protective agency investigator to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse as defined in Section 11165.6.

§11166. Report; duty; time

(a) Except as provided in subdivision (b), any child care custodian, health practitioner, or employee of a child protective agency who has knowledge of or observes a child in his or her professional capacity or within the scope of his or her employment whom he or she knows or reasonably suspects has been the victim of child abuse shall report the known or suspected instance of child abuse to a child protective agency immediately or as soon as practically possible by

telephone and shall prepare and send a written report thereof within 36 hours of receiving the information concerning the incident. For the purposes of this article, "reasonable suspicion" means that it is objectively reasonable for a person to entertain such a suspicion, based upon facts that could cause a reasonable person in a like position, drawing when appropriate on his or her training and experience, to suspect child abuse. For the purpose of this article, the pregnancy of a minor does not, in and of itself, constitute the basis of reasonable suspicion of sexual abuse.

(b) Any child care custodian, health practitioner, or employee of a child protective agency who has knowledge of or who reasonably suspects that mental suffering has been inflicted on a child or his or her emotional well-being is endangered in any other way, may report such known or suspected instance of child abuse to a child protective agency.

(c) Any commercial film and photographic print processor who has knowledge of or observes, within the scope of his or her professional capacity or employment, any film, photograph, video tape, negative or slide depicting a child under the age of 14 years engaged in an act of sexual conduct, shall report such instance of suspected child abuse to the law enforcement agency having jurisdiction over the case immediately or as soon as practically possible by telephone and shall prepare and send a written report of it with a copy of the film, photograph,

video tape, negative or slide attached within 36 hours of receiving the information concerning the incident. As use din this subdivision, "sexual conduct" means any of the following:

(1) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals.

(2) Penetration of the vagina or rectum by any object.

(3) Masturbation, for the purpose of sexual stimulation of the viewer.

(4) Sadomasochistic abuse for the purpose of sexual stimulation of the viewer.

(5) Exhibition of the genitals, pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer.

(d) Any other person who has knowledge of or observes a child whom he or she knows or reasonably suspects has been a victim of child abuse may report the known or suspected instance of child abuse to a child protective agency.

(e) When two or more persons who are required to report are present and jointly have knowledge of a known or suspected instance of child abuse, and when there is agreement among them, the telephone report may be made by a member of the team selected by mutual agreement and a single report may be made and signed by such selected member of the reporting team. Any member who has knowledge that the

member designated to report has failed to do so, shall thereafter make the report.

(f) The reporting duties under this section are individual, and no supervisor or administrator may impede or inhibit the reporting duties and no person making such a report shall be subject to any sanction for making the report. However, internal procedures to facilitate reporting and apprise supervisors and administrators of reports may be established provided that they are not inconsistent with the provisions of this article.

The internal procedures shall not require any employee required to make reports by this article to disclose his or her identity to the employer.

(g) A county probation or welfare department shall immediately or as soon as practically possible report by telephone to the law enforcement agency having jurisdiction over the case, to the agency given the responsibility for investigation of cases under Section 300 of the Welfare and Institutions Code, and to the district attorney's office very known or suspected instance of child abuse as defined in Section 11165.6, except acts or omissions coming within subdivision (b) of Section 11165.2, which shall only be reported to the county welfare department. A county probation or welfare department shall also send a written report thereof within 36 hours of receiving the information concerning the incident to any agency to which it is required to make a telephone report under this subdivision.

A law enforcement agency shall immediately or as soon as practically possible report by telephone to the agency given responsibility for investigation of cases under Section 300 of the Welfare and Institutions Code and to the district attorney's office every known or suspected instance of child abuse reported to it, except acts or omissions coming within this subdivision (b) of Section 111165.2, which shall only be reported to the county welfare department. A law enforcement agency shall report to the county welfare department every known or suspected instance of child abuse reported to it which is alleged to have occurred as a result of the action of a person responsible for the child's welfare, or as the result of the failure of a person responsible for the child's welfare to adequately protect the minor from abuse when the person responsible for the child's welfare knew or reasonably should have known that the minor was in danger of abuse. A law enforcement agency shall also send a written report thereof within 36 hours of receiving the information concerning the incident to any agency to which it is required to make a telephone report under this subdivision.

**§11166.1. Report of abuse occurring in facilities licensed by State Department of Social Services,; notice**

When a child protective agency receives a report of abuse alleged to have occurred in facilities licensed to care for children by the State Department of

Social Services, it shall, within 24 hours, notify the licensing office with jurisdiction over the facility. The child protective agency shall send the licensing agency a copy of its investigation and any other pertinent materials.

§11166.1. Violation of reporting duties; punishment

Any supervisor or administrator who violates subdivision (f) of Section 11166 is guilty of a misdemeanor which is punishable by confinement in the county jail for a term not to exceed six months or by a fine of not more than one thousand dollars ($1,000) or by both.

§11166.2. Telephoned report of child abuse to licensed agencies; written reports

In addition to the reports required under Section 11166, a child protective agency shall immediately or as soon as practically possible report by telephone to the appropriate licensing agency every known or suspected instance of child abuse, except acts or omissions coming within the provisions of paragraph (2) of subdivision (c) of Section 11165, which shall only be reported to the county welfare department, when the instance of abuse occurs while the child is being cared for in a child day care facility, involves a child day care licensed staff person, or occurs while the child is under the supervision of a community care facility or involves a community care facility licensee or staff person. A

child protective agency shall also send a written report thereof within 36 hours of receiving the information concerning the incident to any agency to which it is required to make a telephone report under this subdivision. A child protective agency shall send the ~~li~~censing agency a copy of its investigation report and any other pertinent materials.

§11166.3. **Legislative intent; cooperative arrangements for investigation; written findings; report**

(a) The Legislature intends that in each county the law enforcement agencies and the county welfare or social services department shall develop and implement cooperative arrangements in order to coordinate existing duties in connection with the investigation of suspected child abuse cases. The local law enforcement agency having jurisdiction over a case reported under Section 11166 shall report to the county welfare department that it is investigating the case within 36 hours after starting its investigation. The county welfare department or social services department shall, in accordance with the requirements of subdivision (c) of Section 288, evaluate what action or actions would be in the best interest of the child victim. Notwithstanding any other provision of law, the county welfare department or social services department shall submit in writing its findings and the reasons therefor to the district attorney on or before the completion of the investigation. The written findings

and the reasons therefore shall be delivered or made accessible to the defendant or his or her counsel in the manner specified in Sections 859 and 1430. The child protective agency shall send a copy of its investigative report and any other pertinent materials to the licensing agency upon the request of the licensing agency.

(b) The local law enforcement agency having jurisdiction over a case reported under Section 11166 shall report to the district office of the State Department to Social Services any case reported under this section if the case involves a facility specified in paragraph (5) or (6) of Section 1502 or in Section or in Section 1596.750 or 1596.76 of the Health and Safety Code and the licensing of the facility has not been delegated to a county agency. The law enforcement agency shall send a copy of its investigation report and any other pertinent materials to the licensing agency upon the request of the licensing agency.

§11166.5. **Employment as child care custodian, health practitioner, or with child protective agency; statement of knowledge of duty to report abuse**

(a) Any person who enters into employment on or after January 1, 1985, as a child care custodian, health practitioner, or with a child protective agency, prior to commencing his or her employment, and as a prerequisite to that employment, shall sign a statement on a form provided to him or her by his or her

employer to the effect that he or she has knowledge of the provisions of Section 11166 and will comply with its provisions.

The statement shall include the following provisions:

Section 11166 of the Penal Code requires any child care custodian, health practitioner, or employee of a child protective agency who has knowledge of or observes a child in his or her professional capacity or within the scope of his or her employment whom he or she knows or reasonably suspects has been the victim of child abuse to report the known or suspected instance of child abuse to a child protective agency immediately or as soon as practically possible by telephone and to prepare and send a written report thereof within 36 hours of receiving the information concerning the incident.

"Child care custodian" includes teachers; an instructional aide, a teacher's aide, or a teacher's assistant employed by any public or private school, who has been trained in the duties imposed by this article, if the school district has so warranted to the State Department of Education, a classified employee of any public school who has been trained in the duties imposed by this article, if the school has so warranted to the State Department of Education; administrative officers, supervisors of child welfare and attendance, or certificated pupil personnel employees of any public or private school; administrators of a public or private day camp; licensees, administrators, and employees of licensed

community care or child day care facilities; headstart teachers; licensing workers or licensing evaluators; public assistance workers; employees of a child care institution including, but not limited to, foster parents, group home personnel, and personnel of residential care facilities; and social workers or probation officers; or any person who is an administrator or presenter of, or a counsel in, a child abuse prevention program in any public or private school.

"Health practitioner" includes physicians and surgeons, psychiatrist, psychologists, dentists, residents, interns, podiatrists, chiropractors, licensed nurses, dental hygienists, optometrists, or any other person who is licensed under Division 2 (commencing with Section 500) of the Business and Professions Code; marriage, family and child counselors; emergency medical technicians I or II, paramedics, or other persons certified pursuant to Division 2.5 (commencing with Section 1797) of the Health and Safety Code; psychological assistants registered pursuant to Section 2913 of the Business and Professions Code; marriage, family and child counselor trainees as defined in subdivision (c) of Section 4980.03 of the Business and Professions Code; unlicensed marriage family and child counselor interns registered under Section 4980.44 of the Business and Professions Code; state or county public health employees who treat minors for venereal disease or any other condition; coroner; paramedics; and

religious practitioners who diagnose, examine or treat children.

The signed statements shall be retained by the employer. The cost of printing distribution, and filing of these statements shall be borne by the employer.

This subdivision is not applicable to persons employed by child protective agencies as members of the support staff or maintenance staff and who do not work with, observe, or have knowledge of children as part of their official duties.

(b) On and after January 1, 1966, when a person is issued a state license or certificate to engage in a profession or occupation, the members of which are required to make a report pursuant to Section 11166, the state agency issuing the license or certificate shall send a statement substantially similar to the one contained in subdivision (a) to the person at the same time as it transmits the document indicating licensure or certification to the person. In addition to the requirements contained in subdivision (a), the statement shall also indicate that failure to comply with the requirements of Section 11166 is a misdemeanor, punishable by up to six months in jail or by a fine of one thousand dollars ($1,000) or by both.

(c) As an alternative to the procedure required by subdivision (b), a state agency may cause the required statement to be printed on all application forms for a license or certificate printed on all application forms for a license or

certificate printed on or after January 1, 1986.

§11167. **Report; contents**

(a) A telephone report of a known or suspected instance of child abuse shall include the name of the person making the report, the name of the child, the present location of the child, the nature and extent of the injury, and any other information, including information that led that person to suspect child abuse, requested by the child protective agency.

(b) Information relevant to the incident of child abuse may also be given to an investigator from a child protective agency who is investigating the known or suspected case of child abuse.

(c) Information relevant to the incident of child abuse may be given to the licensing agency when it is investigating a known or suspected case of child abuse, including the investigation report, and other pertinent materials.

(d) The identity of all persons who report under this article shall be confidential and disclosed only between child protective agencies, or to counsel representing a child protective agency, or to the district attorney in a criminal prosecution or in an action initiated under Section 602 of the Welfare and Institutions Code arising from alleged child abuse, or to counsel appointed pursuant to Section 318 of the Welfare and Institutions Code, or to the county counsel or district attorney in an action initiated under Section 232 of the Civil

Code or Section 300 of the Welfare and Institutions Code, or to a licensing agency when abuse in out-of-home care is reasonably suspected, or when those persons waive confidentiality, or by court order.

No agency or person listed in this subdivision shall disclose the identity of any person who reports under this article to that person's employer, except with the employee's consent or by court order.

(e) Persons who may report pursuant to subdivision (d) of Section 11166 are not required to include their names.

§11167.5. Confidentiality of reports; violations; disclosure

(a) The reports required by Sections 11166 and 11166.2 shall be confidential and may be disclosed only as provided in subdivision (b). Any violation of the confidentiality provided by this article shall be a misdemeanor punishable by up to six months in jail or by a fine of five hundred dollars ($500) or by both.

(b) Reports of suspected child abuse and information contained therein may be disclosed only to the following:

(1) Persons or agencies to whom disclosure of the identity of the reporting party is permitted under Section 11167.

(2) Persons or agencies to whom disclosure of information is permitted under subdivision (b) of Section 11170.

(3) Persons or agencies with whom investigations of child abuse are

coordinated under the regulations promulgated under Section 11174.

(4) Multidisciplinary personnel teams as defined in subdivision (d) of Section 18951 of the Welfare and Institutions Code.

(5) Persons or agencies responsible for the licensing of facilities which are for children, as specified in Section 11165.7.

(6) The State Department of Social Services, as specified in paragraph (3) of subdivision (b) of Section 11170, when an individual has applied for a community care license or child day care license, or for employment in an out-of-home care facility, or when a complaint alleges child abuse by an operator or employee of an out-of-home care facility.

(7) Hospital scan teams. As used in this paragraph, "hospital scan team" means a team of three or more persons established by a hospital, or two or more hospitals in the same county, consisting of health care professionals and representatives of law enforcement and child protective services, the members of which are engaged in the identification of child abuse. The disclosure authorized by this section includes disclosures among hospital scan teams located in the same county.

(c) Nothing in this section shall be interpreted to require the Department of Justice to disclose information contained in records maintained under Section 11169 or under the regulations promulgated pursuant to Section 11174, except as otherwise provided in this article.

(d) This section shall not be interpreted to allow disclosure of any reports or records relevant to the reports of child abuse if the disclosures would be prohibited by any other provisions of state or federal law applicable to the reports or records relevant to the reports of child abuse.

§11168. Written reports; forms

The written reports required by Section 11166 shall be submitted on forms adopted by the Department of Justice after consultation with representatives of the various professional medical associations and hospital associations and county probation or welfare departments. Such forms shall be distributed by the child protective agencies.

§11169. Reports of department of justice; investigations; unfounded reports; immunities

A child protective agency shall forward to the Department of Justice a report in writing of every case it investigates of known or suspected child abuse which is determined not to be unfounded, other than cases coming within the provisions of paragraph (2) of subdivision (c) of Section 11165. A child protective agency shall not forward a report to the Department of Justice unless it has conducted an active investigation and determined that the report is not unfounded, as defined in subdivision (n) of Section 11165. If a report has previously been filed which subsequently

proves to be unfounded, the Department of Justice shall be notified in writing of that fact and shall not retain the report. The report required by this section shall be in a form approved by the Department of Justice. A child protective agency receiving a written report from another child protective agency shall not send such report to the Department of Justice.

The immunity provisions of Section 11172 shall not apply to the submission of a report by a child protective agency pursuant to this section. However, nothing in this section shall be construed to alter or diminish any other immunity provisions of state or federal law.

§11170. Indexed reports; notice to child protective agencies or district attorneys; availability of information; notice to parents or guardians

(a) The Department of Justice shall maintain an index of all reports of child abuse submitted pursuant to Section 11169. The index shall be continually updated by the department and shall not contain any reports that are determined to be unfounded. The department may adopt rules governing recordkeeping and reporting pursuant to this article.

(b)(1) The Department of Justice shall immediately notify a child protective agency which submits a report pursuant to Section 11169, or a district attorney who requests notification, of any information maintained pursuant to subdivision (a) which is relevant to the

known or suspected instance of child abuse reported by the agency. A child protective agency shall make that information available to the reporting medical practitioner, child custodian, guardian ad litem appointed under Section 326, or counsel appointed under Section 318 of the Welfare and Institutions Code, or the appropriate licensing agency, if he or she is treating or investigating a case of known or suspected child abuse.

(2) When a report is made pursuant to subdivision (a) of Section 11166, the investigating agency shall, upon completion of the investigation or after there has been a final disposition in the matter inform the person required to report of the results of the investigation and of any action the agency is taking with regard to the child or family.

(3) The department shall make available to the State Department of Social Services any information received subsequent to January 1, 1981, pursuant to this section concerning any person who is an applicant for licensure or employment in a position having supervisorial or disciplinary power over a child or children, or who will provide 24-hour care for a child or children in a residential home or facility, pursuant to Section 1522.1 or 1596.876 of the Health and Safety Code, or Section 226 of the Civil Code. If the department has information which has been received subsequent to January 1, 1981, concerning such a person, it shall also make available to the State Department of Social Services any other

information maintained pursuant to subdivision (a).

(4) The department shall notify parents or legal guardians requesting a background examination of a professional child care provider pursuant to Chapter 3.65 (commencing with Section 1597.80) of Division 2 of the Health and Safety Code of the fact that a substantiated report exists which indicates that the professional child care provider was a suspect of child abuse subsequent to January 1, 1981, or prior to January 1, 1981, if there was also a report subsequent to that date.

(5) The department shall notify parents or legal guardians requesting a background examination of a professional child care provider pursuant to Chapter 3.65 (commencing with Section 1597.80) of Division 2 of the Health and Safety Code, of the fact that no substantiated report exists which indicates that the professional child care provider was a suspect of child abuse subsequent to January 1, 1981.

§11171. X-rays of child; exemption from privilege

(a) A physician and surgeon or dentist or their agents and by their direction may take skeletal X-rays of the child without the consent of the child's parent or guardian, but only for purposes of diagnosing the case as one of possible child abuse and determining the extent of such child abuse.

(b) Neither the physician-patient privilege nor the psychotherapist-patient privilege applies to information reported pursuant to this article in any court proceeding or administrative hearing.

§11171.5. X-rays without parental consent; application for order; liability for costs

(a) If a peace officer, in the course of an investigation of child abuse, has reasonable cause to believe that the child has been the victim of physical abuse, the officer may apply to a magistrate for an order directing that the victim be X-rayed without parental consent.

Any X-ray taken pursuant to this subdivision shall be administered by a physician and surgeon or dentist or their agents.

(b) With respect to the cost of an X-ray taken by the county coroner or at the request of the county coroner in suspected child abuse cases, the county may charge the parent or legal guardian of the child-victim the costs incurred by the county for the X-ray.

(c) No person who administers an X-ray pursuant to this section shall be entitled to reimbursement from the county for any administrative cost that exceeds 5 percent of the cost of the X-ray.

§11172. Immunity from liability; liability for false reports; attorneys fees; failure to report; offense

(a) No child care custodian, health practitioner, employee of a child

protective agency, or commercial film and photographic print processor who reports a known or suspected instance of child abuse shall be civilly or criminally liable for any report required or authorized by this article. Any other person reporting a known or suspected instance of child abuse shall not incur civil or criminal liability as a result of any report authorized by this article unless it can be proven that a false report was made and the person knew that the report was false or was made with reckless disregard of the truth or falsity of the report, and any such person who makes a report of child abuse known to be false or with reckless disregard of the truth or falsity of the report is liable for any damages caused. No person required to make a report pursuant to this article, nor any person taking photographs at his or her direction, shall incur any civil or criminal liability for taking photographs of a suspected victim of child abuse, or causing photographs to be taken of a suspected victim of child abuse without parental consent, or for disseminating the photographs with the reports required by this article. However the provisions of this section shall not be construed to grant immunity from this liability with respect to any other use of the photographs.

(b) Any child care custodian, health practitioner, or employee of a child protective agency who, pursuant to a request from a child protective agency, provides the requesting agency with access

to the victim of a known or suspected instance of child abuse shall not incur civil or criminal liability as a result of providing that access.

(c) The Legislature finds that even though it has provided immunity from liability to persons required to report child abuse, that immunity does not eliminate the possibility that actions may be brought against those persons based upon required reports of child abuse. In order to further limit the financial hardship that those persons may incur as a result of fulfilling their legal responsibilities, it is necessary that they not be unfairly burdened by legal fees incurred in defending those actions. Therefore, a child care custodian, health practitioner, an employee of a child protective agency, or commercial film, and photographic print processor may present a claim to the State Board of Control for reasonable attorneys' fees incurred in any action against that person on the basis of making a report required or authorized by this article if the court has dismissed the action upon a demurrer or motion for summary judgment made by that person, or if he or she prevails in the action. The State Board of Control shall allow that claim if the requirements of this subdivision are met, and the claim shall be paid from an appropriation to be made for that purpose. Attorneys' fees awarded pursuant to this section shall not exceed an hourly rate greater than the rate charged by the Attorney General of the State of California at the time the award

is made and shall not exceed an hourly rate greater than the rate charged by the Attorney General of the State of California at the time the award is made and shall not exceed an aggregate amount of fifty thousand dollars ($50,000).

This subdivision shall not apply if a public entity has provided for the defense of the action pursuant to Section 995 of the Government Code.

(d) A court may award attorney's fees to a commercial film and photographic print processor when a suit is brought against the processor because of a disclosure mandated by this article and the court finds this suit to be frivolous.

(e) Any person who fails to report an instance of child abuse which he or she knows to exist or reasonably should know to exist, as required by this article, is guilty of a misdemeanor and is punishable by confinement in the county jail for a term not to exceed six months or by a fine of not more than one thousand dollars ($1,000) or by both.

§11174. Guidelines

The Department of Justice, in cooperation with the State Department of Social Services, shall prescribe by regulation guidelines for the investigation of abuse in out-of-home care, as defined in subdivision (f) of Section 11165, and shall ensure that the investigation is conducted in accordance with the regulations and guidelines.

**§11174.1. Investigation of child abuse in facilities licensed to care for children; guidelines; conduct**

The Department of Justice, in cooperation with the State Department of Social Services shall prescribe by regulation guidelines for the investigation of child abuse, as defined in subdivision (f) of Section 11165, in facilities licensed to care for children, and shall ensure that the investigation is conducted in accordance with the regulations and guidelines.

**§11174.3. Interviewing victim at school; presence of school staff member; confidentiality; admissibility of evidence; informing districts and agency employees of section requirements**

(a) Whenever a representative of a child protective agency deems it necessary, a suspected victim of child abuse may be interviewed during school hours, on school premises, concerning a report of suspected child abuse that occurred within the child's home. The child shall be afforded the option of being interviewed in private or selecting any adult who is a member of the staff of the school, including any certificated or classified employee or volunteer aide, to be present at the interview. A representative of the child protective agency shall inform the child of that right prior to the interview. The purpose of the staff person's presence at the interview is to lend support to the child and enable him or her to be as comfortable

as possible; however, the member of the staff so elected shall not participate in the interview. The member of the staff so present shall not discuss the facts or circumstances of the case with the child. The member of the staff so present, including, but not limited to, a volunteer aide is subject to the confidentiality requirement of this article, a violation of which is punishable as specified in Section 11167.5. A representative of the school shall inform a member of the staff so selected by a child of the requirements of this section prior to the interview. A staff member selected by a child may decline the request to be present at the interview. If the staff person selected agrees to be present, the interview shall be held at a time during school hours when it does not involve an expense to the school. Failure to comply with the requirements of this section does not affect the admissibility of evidence in a criminal or civil proceeding.

(b) The Superintendent of Public Instruction shall notify each school district, and each child protective agency shall notify each of its employees who participate in the investigation of reports of child abuse, of the requirements of this section.

§11174.5. Repealed by Stats. 1987, c.1444, §3

# APPENDIX E

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VIRGINIA McMARTIN and
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

| | |
|---|---|
| VIRGINIA McMARTIN and PEGGY-ANN BUCKEY,<br><br>Plaintiffs,<br><br>vs.<br><br>COUNTY OF LOS ANGELES; CITY OF MANHATTAN BEACH; CHILDREN'S INSTITUTE INTERNATIONAL; KATHLEEN "KEE" ASTRID HAGAR, BRUCE WOODLING; ROBERT PHILOBOSIAN; WAYNE SATZ; ABC TELEVISION, INC.; and DOES 1 through 200,<br><br>Defendants. | CASE NO. 601 854<br>FIRST AMENDED COMPLAINT FOR:<br>1. Breach of a Rule of Law;<br>2. Violation of Civil Rights (42 U.S.C. 1983);<br>3. Conspiracy to Violate Civil Rights;<br>4. Declaratory Relief-Comparative Equitable Indemnity;<br>5. RICO 918 U.S.C. 1961);<br>6. Breach of Mandatory Duty by District Attorney (Prosecu-<br>7. Intentional Infliction of Emotional Distress;<br>8. Defamation;<br>9. Outrageous |

Conduct By a
10. Television Station
11. Battery;
12. Interference with Prospective Advantage;
13. Negligent Infliction of Emotional Distress.

Plaintiffs allege as follows, and reference hereinafter to the singular "Plaintiff" includes both Plaintiffs VIRGINIA McMARTIN and PEGGY-ANN BUCKEY unless the text specifically indicates otherwise:

PRELIMINARY ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

1. VIRGINIA McMARTIN and PEGGY-ANN BUCKEY are and were at all times relevant to this action residents of Los Angeles County; and were until events alleged below, which began some time in 1983, duly licensed pre-school teachers, jointly

owned and operated the Virginia McMartin Preschool (the "Preschool") in Manhattan Beach, California, and held all of the appropriate licenses and credentials to do so.

2. At a date not specifically known to Plaintiff, but believed to have been some time in 1983, one or more children who were then or had been students at the Preschool, and/or the parents of such children, came into contact with agents, officers or employees of the Police Department of defendant CITY OF MANHATTAN BEACH (referred to hereinafter as "CITY" or "MANHATTAN BEACH"), a chartered city that was at all times here relevant duly organized and existing as a city under the laws of the State of California. Plaintiff is informed and believes that

after such contacts, but without a reasonable factual basis CITY commenced a purported "child abuse investigation" regarding the Preschool. In fact no such child abuse had occurred; there was no reasonable basis on which to commence an investigation; nor has plaintiff at any time engaged in, condoned or had any knowledge of, nor any reason to suspect such had occurred at or in connection with the Preschool.

3. At some point after the purported child abuse investigation began but prior to the indictments identified below, CITY received the active assistance of Defendant COUNTY OF LOS ANGELES ("COUNTY"), a political subdivision of the State of California, through COUNTY's Sheriff's Department and COUNTY's District

Attorney's office, who like MANHATTAN BEACH also did not conduct their own or any independent investigation of the alleged child abuse. Plaintiff is further informed and believes that both CITY and COUNTY retained Defendant CHILDRENS' INSTITUTE INTERNATIONAL, formerly Big Sisters' League (hereinafter "INSTITUTE"), to interview, examine, interrogate and evaluate the alleged victims of child abuse, and report to CITY and COUNTY whether child abuse had occurred and who the perpetrators were. In doing the things herein alleged, INSTITUTE was at all times acting by and through its duly authorized officers and agents, Defendants KATHLEEN "KEE" McFARLANE ("McFARLANE"), ASTRID HAGAR ("HAGAR"), and BRUCE WOODLING ("WOODLING"), who were aided and assisted

by others not now specifically known to Plaintiff.

5. Plaintiff is informed and believes that INSTITUTE is a California non-profit corporation which holds itself out to the public as an independent, professional and objective organization that is expert at the task of assessing whether in fact child abuse has occurred, the nature thereof and the identity of the perpetrator.

6. Subsequent to the attempted performance of its task, but before the indictments identified below, INSTITUTE reported to CITY and COUNTY its conclusions that numerous acts of child abuse had occurred at the Preschool, and that Plaintiff, among others, was a perpetrator or probable perpetrator

thereof, although the INSTITUTE had no contact with Plaintiff nor specific knowledge about Plaintiff at the time such report was made; and, INSTITUTE had violated substantially all standards for interviewing alleged child abuse victims, including without limitation, unduly leading interrogation, coaching of statements, and intimidating children into making false charges against Plaintiff. Plaintiff is further informed and believes that the INSTITUTE and its agents, including without limitation Defendants McFARLANE, WOODLING and HAGAR, engaged in such improper activities because it was to their economic, personal and professional advantage to produce reports leading to indictments of Plaintiff and others and

publicity about INSTITUTE, McFARLANE, WOODLING and HAGAR.

7. Plaintiff is informed and believes that some time in 1984, after INSTITUTE's reports to CITY and COUNTY, Defendant ROBERT PHILOBOSIAN ("PHILOBOSIAN"), the duly appointed and acting District Attorney of COUNTY, who was then a candidate for election to that office, decided to present to COUNTY's Grand Jury the name of Plaintiff, among others, for indictment for the alleged child abuse at Preschool. Plaintiff is further informed and believes that PHILOBOSIAN based his decision upon the recommendations of CITY, the reports of the INSTITUTE, McFARLANE, HAGAR, HAGAR and WOODLING, the advice of agents and employees of CITY and COUNTY (none of whom

had in fact conducted an independent investigation of the alleged child abuse), and on his assessment of the value of the publicity attendant to an indictment under the circumstances present for his ongoing political campaign.

8. Subsequently in 1984, the Grand Jury indicted Plaintiff and others on numerous counts of child abuse and related offenses in connection with the Preschool, based upon alleged facts selected for presentation to the Grand Jury by PHILOBOSIAN and those acting under his direction and control, and after the suppression and other mishandling of evidence exculpatory of Plaintiff.

9. Thereafter, Plaintiff was subjected to arrest and booking procedures, amid tremendous amounts of

publicity generated by CITY, COUNTY, INSTITUTE and others.

10. Plaintiff was then subjected to additional pre-trial proceedings and eighteen (18) months of preliminary hearings.

11. On or about January 17, 1986, the elected District Attorney, Ira Reiner, announced his intention to cause the dismissal of all charges against Plaintiff on the grounds that there was no evidence against Plaintiff with which to proceed the trial, and the case was shortly thereafter dismissed.

12. The true names, identities and capacities of DOES 1 through 200 are unknown to Plaintiff at this time, whether individual, corporate, governmental entities or others, but they are believed

to have been in some way involved by act or omission of duty in the events alleged herein and responsible in some manner for Plaintiff's damages as alleged, and Plaintiff therefore sues such Defendants by these fictitious names which will be amended to allege their true names and capacities when they are known to Plaintiff.

13. Each Defendant, whether named or DOE, is believed to have been the agent of each of the other Defendants and acting within the course and scope of such agency with respect to the matters herein alleged, except where the contrary is specifically pleaded.

14. Within 100 days of the dismissal of criminal charges against Plaintiff, Plaintiff filed claims with COUNTY

alleging the same facts as are alleged through this Complaint, claiming continuing tortious conduct by COUNTY from 1984 through 1986, under the California Tort Claims Act, Government Code Sections 911 et seq. Subsequent to filing such claims, Plaintiff learned of facts indicating such tortious conduct began at an earlier date in 1983. Within six (6) months of filing of this action COUNTY rejected said claim, or is deemed by law to have done so and as a result thereof Plaintiff has been damaged in a sum in excess of this Court's minimum jurisdiction.

15. Plaintiff was disabled from filing an earlier claim by the circumstances of the criminal prosecution, the publicity, the damages suffered and the

combined acts of Defendants, which would have in any event rendered any claim filing an idle act, and prevented Plaintiff's adequate knowledge of the claim. Plaintiff further alleges that any impediment to this action based on alleged failure to comply with government claims presentation procedures is invalid on the ground that such procedures deny Plaintiff equal protection of the laws, and deny due process, especially under the 5th Amendment to the United States Constitution's prohibition against requiring a criminal defendant to engage in self-incrimination.

FIRST CAUSE OF ACTION
(Breach of A Rule of Law)

16. Paragraphs 1 through 15 above are incorporated in this paragraph by this reference, and Plaintiff further alleges

on information and belief against all Defendants identified therein as follows:

17. In carrying out the purported child abuse investigation, Defendants CITY and COUNTY were governed by a published manual of procedures, in accordance with mandatory State of California policy for such investigations (Pen. Code Sec. 13823.5), adopted for their direction and control by the relevant governmental bodies and constituting a rule of law as defined in Government Code Section 811.6. Each Defendant deliberately, willfully and intentionally failed to take the steps specifically identified in such policy and manual, and ignored the concerns that such policy and manual direct they shall consider to lawfully conduct such an investigation in a manner which protects

the rights of both the alleged victim and alleged suspect such as Plaintiff. Said Defendants also concealed their failure to comply with the policy and manual in any substantial respect, and continued that concealment at the time this action is filed.

18. The derelictions of duty set forth above in paragraph 17 resulted in false accusations, unjustified criminal charges and the destruction, loss or suppression of exculpatory evidence regarding Plaintiff. Such derelictions of duty caused Plaintiff damages, including but not limited to, loss of business property, loss of professional licensing, loss of real property, loss of income, hatred of Plaintiff, humiliation, obloquy, anger and despair, all in a sum in excess

of this Court's jurisdictional minimum. In addition, because Defendants' acts and omissions of duty were willful, deliberate, intentional, malicious and for the specific purpose of injuring Plaintiff for the individual and corporation Defendants' personal or business advantage, Plaintiff seeks exemplary damages of not less than $10,000,000.00 by way of punishment and for the sake of example.

SECOND CAUSE OF ACTION
(42 U.S.C. Section 1983; Civil Rights)

19. Paragraphs 1 through 15 above are incorporated in this paragraph by this reference and Plaintiff further alleges against all Defendants identified therein as follows:

20. Plaintiff is a citizen of the United States, and a resident of the

County of Los Angeles and the State of California, and was so at all times here relevant. Plaintiff brings this action pursuant to 42 U.S.C. Section 1983, to redress the deprivation by Defendants, who acted under color of state of law, of the rights, privileges and immunities secured by the statutes and Constitution of the United States. Specifically, Plaintiff alleges that with respect to the events alleged in paragraph 19, each of the Defendants, acted under color of state law, as a matter of governmental policy of CITY and COUNTY, recklessly and in a gross and negligent manner, and with deliberate indifference towards Plaintiff's rights, privileges, and immunities, and filed to protect Plaintiff with procedural due process, inflicted cruel and unusual

punishment upon Plaintiff while in Defendants' custody and control and failed to follow Defendants' own statutory and regulatory requirements designed to protect Plaintiff as required by law and as comparable to that which Defendants made available to other similarly situated persons within Defendants' jurisdiction.

21. As a direct and proximate result of the acts and omissions of duty by Defendants as alleged above, Plaintiff sustained injuries which include but are not limited to the following: loss of property, employment and earnings, humiliation and severe emotional distress in that Plaintiff endured embarrassment, public obloquy, unemployment, financial destitution, strained familial and social relationships, loss of self esteem and

permanent impairment of Plaintiff's earning capacity, as well as other financial and personal injuries in an amount not yet fully determined but in excess of the jurisdictional minimum of this Court.

THIRD CAUSE OF ACTION
(Conspiracy to Violate Civil Rights)

22. Paragraphs 1 through 15, and 19 through 21 above are incorporated in this paragraph by this reference, and Plaintiff further alleges as follows on information and belief against all Defendants named therein:

23. Beginning in approximately 1983, and continuing to the present, each of the named Defendants, and other not presently known to Plaintiff, agreed and conspired to associate for the purposes of violating Plaintiff's civil rights under the laws

and Constitutions of the State of California and the United States by whatever means, whether legal or illegal, available to the Defendants. As part of such conspiracy, it was agreed to conduct the purported child abuse investigation through INSTITUTE rather than an actual investigation, to violate the policy and manual for such investigations, as well as to take other steps in pursuit of the conspiracy and to harass, annoy, injure and abuse Plaintiff by various unlawful means, including destruction and suppression of exculpatory evidence. In pursuit of such conspiracy, each of the Defendants engaged in the acts and omissions of duty alleged in paragraphs 1 through 15, 17 and 20 from 1983 to the present.

24. In doing the acts and omissions alleged above, Defendants all acted willfully, maliciously and with the specific intent to injure Plaintiff for the individual and corporate Defendants' personal or business advantage. Plaintiff is therefore entitled to exemplary damages in an amount not less than $10,000,000.00 by way of example and for the sake of punishment of said Defendants.

FOURTH CAUSE OF ACTION
(Declaratory Relief-Comparative Equitable Indemnity)

25. Paragraphs 1 through 15 above are incorporated in this paragraph by this reference, and Plaintiff alleges as follows against all Defendants named therein, and against the additional Defendants named in the Eighth Cause of

Action and identified therein as the "ABC Defendants":

26. Plaintiff has been within the year last past sued for damages in Los Angeles Superior Court by numerous parents and/or legal guardians of former students at McMartin Preschool (collectively "complainants" and the "Civil Lawsuits"). Plaintiff has been required to expend funds and effort to defend the Civil Lawsuits which allege that Plaintiff is responsible for the traumas, emotional distress, sexual damage and other emotional harms suffered by complainants' children and wards, as well as other damages flowing therefrom, which occurred, if at all, during and after the commencement of the purported child abuse investigation, the interviews of the

children by INSTITUTE, McFARLANE, WOODLING, and HAGAR and other agents of INSTITUTE, and the activities of the ABC Defendants set forth in the Eighth and Ninth Causes of Action herein.

27. If, contrary to fact, any such damages have occurred as alleged in the Civil Lawsuits, and Plaintiff is found liable therefore, Plaintiff's liability is based on passive negligence, whereas Defendants are primarily liable because of their active and intentional misconduct which was the proximate cause of such damages through the purported child abuse investigation, and the publicity attendant thereto which was staged, created and manipulated by the ABC Defendants.

28. An actual controversy has arisen and now exists between Plaintiff and each

of the Defendants named above regarding their respective legal rights, duties and liabilities with regard to the rights of comparative equitable indemnity between them with respect to the damages, if any, in the Civil Lawsuits. Plaintiff seeks a declaration of this Court on such respective rights, duties and liabilities of Plaintiff and Defendants with regard to complainants' claims, and indemnity from Defendants based upon their comparative fault.

FIFTH CAUSE OF ACTION
(18 U.S.C. Sections 1961 et seq.; "RICO")

29. Paragraphs 1 through 15 above are incorporated in this paragraph by this reference, and Plaintiff alleges as follows on information and belief against all Defendants named therein and against

the additional or "ABC Defendants" identified in the Eighth Cause of Action:

30. In and after 1983, each of the Defendants engaged in a pattern or racketeering activity through one or more enterprises engaged in and affecting interstate commerce, causing thereby economic injuries to Plaintiff in violation of 18 U.S.C. Section 1962, including the loss of Plaintiff's interest in the Preschool, professional licenses and business income. Defendants associated together for the common purpose of engaging in the racketeering activity alleged herein, thereby constituting an enterprise as defined by 18 U.S.C. Section 1961(4), and further used other entities such as the COUNTY District Attorney's Office for such racketeering purposes.

The enterprise created, promoted, manipulated and maintained by Defendants' association in fact is known as the "McMartin Preschool Controversy", and through the Defendants' efforts and for their economic and other benefits, it now exists. The racketeering activity engaged in by Defendants since 1983 includes, but is not limited to, obstruction of justice under 18 U.S.C. Section 1961(1)(A), specifically by "leaking" from McFARLANE and employees of the District Attorney's Office to the ABC Defendants and others, testimony and documentary evidence which was subject to protective orders in the criminal court proceedings against Plaintiffs, and by Defendants' suppression, destruction and manipulation of evidence such as that discrediting the

mental stability and veracity of Judy Johnson, the initial complaining witness against Plaintiff in 1983.

31. Plaintiff was injured by the racketeering activities of the Defendants, and was damaged as alleged in paragraphs 18 and 21 above, and therefore is entitled to treble actual damages, plus attorneys' fees pursuant to 18 U.S.C. Section 1964(c).

SIXTH CAUSE OF ACTION
(Breach of A Mandatory Pre-Indictment Duty by District Attorney)

32. Paragraphs 1 through 15, 17, 20, 13 and 30 are incorporated in this paragraph by this reference, and Plaintiff alleges as follows against ROBERT PHILOBOSIAN only, on information and belief:

33. Pursuant to Article 4, Section 6067 of the State Bar Act, PHILOBOSIAN

took an oath to faithfully discharge the duties of an attorney, which include under Section 6068(q), "Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest." In addition, PHILOBOSIAN took a similar oath of office upon becoming District Attorney to uphold and fairly enforce the laws within his jurisdiction. Such oaths are a mandatory duty imposed by law and consent on PHILOBOSIAN which he breached by conducting the purported investigation as alleged above, specifically including without limitation, the acts and omissions of duty described in paragraphs 7, 17, 20, 23 and 30.

34. As a direct and proximate result of PHILOBOSIAN's breach of mandatory

duties alleged above, Plaintiff was injured and damaged as alleged in paragraphs 18 and 21.

35. The acts and omissions of PHILOBOSIAN were fraudulent, malicious, done with a deliberate disregard for the rights and feelings of Plaintiff and for corrupt and evil political motives and personal gain, and continued after PHILOBOSIAN left public office in the form of statements by him that Plaintiff was guilty of the crimes charged, despite the lack of evidence therefor, and Plaintiff is therefore entitled to punitive damages according to proof by way of example and for the sake of punishment.

SEVENTH CAUSE OF ACTION
(Intentional Infliction of Emotional Distress)

36. Paragraphs 1 through 15 are incorporated in this paragraph by this reference, and Plaintiff further alleges only against Defendants McFARLANE, HAGAR, PHILOBOSIAN and DOES 2 through 20, as follows:

37. Defendants acted as alleged above in paragraph 36 out of deliberately evil and malicious motives, for unreasonable and outrageous personal, political and/or financial gain at the knowing and intentional expense of Plaintiff, and with conscious disregard for Plaintiff's rights and feelings. Defendants' acts caused and were intended to cause Plaintiff to suffer severe and extreme emotional distress, mental anguish, shock, horror, grief, humiliation, anger, embarrassment,

chagrin, worry and nausea for the purpose, among others, of rendering Plaintiff incapable of resisting Defendants' schemes. Defendants' acts were particularly outrageous and egregious because they occupied positions of public trust, authority, respect and power over Plaintiff in Plaintiff's community, which Defendants deliberately and intentionally manipulated to cause Plaintiff's injuries as alleged above.

38. Plaintiff seeks general damages for these injuries in a sum in excess of this Court's jurisdictional minimum; and, because Defendants' acts were willful, malicious, deliberate, intentional and outrageous, Plaintiff seeks exemplary damages of not less than $10,000,000.00 by

way of example and for the sake of punishment.

EIGHTH CAUSE OF ACTION
(Defamation)

39. Paragraphs 1 through 15 are incorporated in this paragraph by this reference, and Plaintiff further alleges against all Defendants named therein and the additional Defendants named below, as follows on information and belief:

40. Additional Defendants are ABC TELEVISION, INC., a corporation doing business in this County as a television broadcast station, also known as "Channel 7", and WAYNE SATZ, an employee of ABC TELEVISION, INC. Each of these additional Defendants was the agent of each other additional Defendants, acting within the course and scope of said agency with respect to the matters alleged hereinbelow

and are sometimes jointly referred to as the "ABC Defendants."

41. This Complaint is not barred by Civil Code Section 48.7 (a) because the criminal charges against Plaintiff for alleged child abuse have been dismissed; nor is any Defendant factually qualified for immunity under Civil Code Section 48.9; nor were any of the defamatory statements herein alleged made under a totality of circumstances which made those statements subject to any absolute privilege to make them.

42. Plaintiff is informed and believes that each of the Defendants joined in and republished each of the defamatory statements herein alleged, as well as others not now specifically known to Plaintiff, and continued to do so from

some time in 1983 or 1984 prior to the bringing of criminal charges of alleged child abuse against Plaintiff, up to and including the period after the criminal charges against Plaintiff were formally dismissed in January, 1986.

43. The specific defamatory statements by Defendants include, but are not limited to, oral statements that Plaintiff is and was: guilty of criminal violations of sections of the Penal Code of California forbidding child abuse/child molestation; committed various sexual assaults upon children; threatened and intimidated children; conducted "Satanic rituals" with or in front of children; "mutilated" dead and live animals, and other disgusting and repulsive acts involving sexual perversion and

children,including allegations that Plaintiff had done such to create "child pornography". Such statements were made by ABC TELEVISION, INC. and its agents on daily newscasts throughout the period from at least 1984 to the present. The precise wording and dates on which such defamatory statements were broadcast by ABC Defendants are recorded on video tapes in their possession and control and are not otherwise known at this time to Plaintiff as "child abuser," "child molester", "child pornographer", and similar terms.

44. Such statements were made about and concerning Plaintiff and were so understood by those who heard them, who include hundreds of persons throughout this County and elsewhere.

45. The aforesaid defamatory statements were false and known by Defendants to be false. Plaintiff took all reasonable steps within Plaintiff's ability to counteract said statements including making public denials and demands for retraction while being interviewed by the ABC Defendants and others, and any being interviewed by the ABC Defendants and others, on dates not now specifically known to Plaintiff but in Defendants' possession or control by virtue of their video tapes, and any further requirement for mitigation on Plaintiff's part is excused by the circumstances attending the extended criminal prosecution of Plaintiff and Defendants' willful and malicious acts of oppression against Plaintiff, which

include creation and coaching of events and testimony so as to concoct newsworthy items to support the accusations against Plaintiff.

46. The acts of Defendants caused Plaintiff a loss of reputation, shame, mortification and hurt feelings in an amount in excess of this court's jurisdictional minimum. Plaintiff also seeks special damages because Defendants' acts were intended to cause and did cause the destruction of Plaintiff's ability to carry on the business and employment of child care professional, caused the loss of operation of the Preschool and caused Plaintiff a loss of business property and income therefrom in excess of this Court's jurisdictional minimum, but not yet fully determined.

47. Defendants were guilty of actual malice in that they had a state of mind of hatred and ill will toward Plaintiff, did not have a good faith belief in the truth of the defamatory statements at the time they were made, and therefore Plaintiff seeks exemplary damages against Defendants and each of them of not less than $10,000,000.00 by sake of example and by way of punishing Defendants.

NINTH CAUSE OF ACTION
(Outrageous Conduct By a Television Station-Media Malpractice)

48. Paragraph 40 is incorporated in this paragraph by this reference, and Plaintiff further alleges against the ABC Defendants only, as follows:

49. The ABC Defendants are in the business of broadcast journalism, and present themselves to the public as

objective, neutral, unbiased and disinterested reporters and commentators on news-worthy events, and so presented themselves to the public from 1983 to present, specifically including numerous friends and neighbors of Plaintiff, as well as Plaintiff's actual or potential employers, co-workers and customers and governmental personnel responsible for professional licenses Plaintiff held. Plaintiff is informed and believes that in truth an in fact, ABC Defendants, at least in part because of Defendant WAYNE SATZ'S personal involvement with Defendant MCFARLANE throughout the investigation and criminal proceedings against Plaintiff, were not objective, neutral or disinterested. Defendants coached testimony, participated in leaking

evidence subject to court protective orders and otherwise manipulated and distorted events so as to report thereon to SATZ and McFARLANE'S personal advantage, and further so as to present Plaintiff in a false and misleading light with respect to events alleged in paragraphs 1 through 15 above. Plaintiff is further informed and believes that the facts herein alleged with respect to Defendant SATZ were known or should have been known with reasonable diligence by ABC TELEVISION, INC., who took no action to alter or prevent or remedy the misconduct of SATZ and its effects of distortion and fabrication of evidence presented against Plaintiff in the criminal proceedings and reported in the news media. In sum, the ABC Defendants

created at least part of the news they purported to report in a disinterested manner from 1983 to present.

50. Plaintiff alleges that the acts of the ABC Defendants caused the damages alleged in paragraphs 18 and 21; and because of said Defendants' intentional, deliberate and willful conduct and their conscious disregard for the rights and feelings of Plaintiff, Plaintiff seeks exemplary damages of not less than $10,000,000.00 for the sake of example and by way of punishing Defendants for the severe emotional distress, horror, shock, mental anguish, worry and nausea caused to Plaintiff by the ABC Defendants.

TENTH CAUSE OF ACTION
(Invasion of Privacy)

51. Plaintiff incorporates paragraphs 1 through 15 above in this

paragraph by reference, and further alleges against all Defendants named therein as follows:

52. Beginning in approximately May, 1984, and continuing through dismissal of the criminal charges in 1986, each of the Defendants invaded Plaintiff's right of privacy by negligently and recklessly investigating the Preschool and Plaintiff's connection therewith; and, in the course of that investigation, each of said Defendants published oral and written material which stated in substance or effect that Plaintiff was a pedophile and involved in sexual abuse of children, child molestation , Satanic rituals, mutilation of animals and similar disgusting and repulsive acts. In said investigation, each of the Defendants

published such statements about Plaintiff in questioning Plaintiff's friends, neighbors , business associates and others in a way which impugned Plaintiff's integrity, accused Plaintiff of such offenses and gave the impression that Plaintiff was involved in widespread criminal activity, solely because of plaintiff's connection with Preschool. Such statements were also made by Defendants in press releases, press interviews and public announcements and statements which disclosed plaintiff's name and address, and resulted in unwarranted and unwanted public attention for Plaintiff, including hate mail and similar matters.

53. The alleged information and facts disclosed about Plaintiff were

private facts which Plaintiff desired to keep private and were unnecessary for Defendants to disclose in a legitimate investigation. The aforesaid statements by Defendants were false and placed Plaintiff in a false light among friends, neighbors, business associates and the general public by portraying Plaintiff as a child abuser and associate of child molesters and child pornographers.

54. As a direct and proximate result of the Defendants' acts alleged above, Plaintiff was scorned and abandoned by friends and associates, vilified in public and private, subjected to ridicule and contempt and suffered a loss of reputation and standing in the community, all of which caused Plaintiff severe humiliation, embarrassment, hurt feelings, outrage and

mental anguish, to Plaintiff's damage in an amount in excess of this Court's minimum jurisdiction.

55. Because the acts of Defendants described above were willful, deliberate, malicious and with a conscious disregard of Plaintiff's rights and feeling, Plaintiff seeks exemplary damages against Defendants and each of them for not less than $10,000,000.00.

ELEVENTH CAUSE OF ACTION
(Battery)

56. Paragraphs 1 through 15 above are incorporated in this paragraph by this reference and Plaintiff further alleges against all Defendants named therein as follows:

57. Beginning in 1984, and continuing periodically thereafter up to dismissal in 1986 of the criminal charges

against Plaintiff, Plaintiff was pushed, shoved, kicked and also hit and tripped by agents and employees of Defendants and persons under Defendants' control from whom Defendants had a duty to protect Plaintiff while Plaintiff was in Defendants' custody and control but failed to do so.

58. By reason of the aforementioned acts of Defendants, Plaintiff has suffered severe and extreme mental anguish, physical pain and suffering, all to Plaintiff's damage in a sum in excess of this Court's minimum jurisdiction.

59. The acts of Defendants were malicious, deliberate, willful and intentional and done with a conscious disregard for Plaintiff's rights and

feelings, and Plaintiff seeks exemplary damages of $10,000,000.00.

TWELFTH CAUSE OF ACTION
(Interference with Prospective Advantage)

60. Paragraphs 1 through 15 above are incorporated in this paragraph by this reference, and Plaintiff alleges as follows against all Defendants named therein:

61. At all times prior to the commencement of the purported investigation of child abuse at Preschool by said Defendants, Plaintiff was employed and engaged in the business of child care professional in Manhattan Beach, California, and received a regular income therefrom, upon which Plaintiff depended for a livelihood and payment of the necessities of life.

62. At all times relevant to this action, each of the Defendants named above had a duty to Plaintiff to conduct their investigation of child abuse and related proceedings in a manner which preserved the rights of Plaintiff to fairness, privacy, due process and equal protection under the law. However, during 1984 and continuing through at least dismissal of the criminal charges in 1986, each of the Defendants conspired with each other Defendant and among themselves and agreed to injure and destroy Plaintiff's business and financial interests as well as standing in the community in which Plaintiff worked by intentionally and recklessly investigating and accusing Plaintiff of child abuse, child molestation, child pornography, devil

worship, animal mutilation and other heinous acts. Defendants executed such interference with Plaintiff's business and employment by their widespread dissemination of such allegations against Plaintiff which resulted in loss of business, employment and income to Plaintiff which could have been reasonably relied upon by Plaintiff for future income. Plaintiff is informed and believes that as a result of the events alleged in paragraphs 1 through 15, Plaintiff is now and will be unemployable in Plaintiff's regular profession.

63. As a direct and proximate result of the wrongful conduct of each of the Defendants named above, and pursuant to their conspiracy and interference with Plaintiff's business and profession,

Plaintiff has suffered and will continue to suffer a loss of income in an amount in excess of this Court's jurisdictional minimum.

64. Because each of the Defendant's acts alleged above was willful, deliberate, intentional and with conscious disregard for the rights and feelings of Plaintiff, Plaintiff seeks exemplary damages of not less than $10,000,000.00.

THIRTEENTH CAUSE OF ACTION
(Negligent Infliction of Emotional Distress)

65. Paragraphs 1 through 15 above are incorporated in this paragraph by this reference, and Plaintiff further alleges against all Defendants named therein as follows:

66. Each of the Defendants had a duty to Plaintiff to conduct the investi-

gation of alleged child abuse and related proceedings in a diligent and reasonable manner which protected Plaintiff's right to privacy and due process and equal protection under the law, and so as not to unreasonably interfere with Plaintiff's private, social, business, employment and financial interests.

67. Beginning in 1984 and continuing through the dismissal of criminal charges in 1986, each of the Defendants so negligently performed their duties and responsibilities that Plaintiff was publicly identified as a person guilty of heinous crimes against children before any criminal charges were filed, continued to be so labeled despite the absence of any evidence to that effect, and continues to this day to suffer the consequences

thereof despite Plaintiff's interests and reputation.

68. As a direct and proximate result of each of the above named Defendants gross and reckless disregard for the rights and feelings of Plaintiff, Plaintiff has suffered and continues to suffer severe emotional distress, humiliation, embarrassment, physical and emotional injuries, shock, horror and nausea, all in an amount in excess of the minimal jurisdiction of this Court.

PRAYER

THEREFORE, Plaintiff seeks judgment against Defendants and each of them as follows:

1. On the First Cause of Action, general damages according to proof; and exemplary damages of not less

than $10,000,000.00;

2. On the Second Cause of Action, general damages according to proof; and exemplary damages of not less than $10,000,000.00;

3. On the Third Cause of Action, general damages according to proof; and exemplary damages of not less than $10,000,000.00;

4. On the Fourth Cause of Action, a declaration of the respective rights and obligations of Plaintiff and Defendants with respect to complainants' civil suits against Plaintiff and Plaintiff's right to indemnity from Defendants;

5. On the Fifth Cause of Action, general damages according to proof, trebled;

6. On the Sixth Cause of Action, general and exemplary damages according to proof;

7. On the Seventh Cause of Action, general damages according to proof, and exemplary damages of not less than $10,000,000.00;

8. On the Eighth Cause of Action, general and special damages according to proof, and exemplary damages of not less than $10,000,000.00;

9. On the Ninth Cause of Action, general damages according to proof, and exemplary damages of not less than $10,000,000.00;

10. On the Tenth Cause of Action, general damages according to proof, and exemplary damages of not less than $10,000,000.00;

11. On the Eleventh Cause of Action, general damages according to proof, and exemplary damages of not less than $10,000,000.00;

12. On the Twelfth Cause of Action, general and special damages according to proof, and exemplary damages of not less than $10,000,000.00;

13. On the Thirteenth Cause of Action, general damages according to proof;

14. Reasonable attorneys' fees; and

15. Such other and further relief as the Court deems just and proper.

Respectfully submitted,

DATED: February 4, 1987.

JAMES H. DAVIS
Attorney for Plaintiffs
VIRGINIA McMARTIN and
PEGGY ANN BUCKEY

# APPENDIX F

Supreme Court No. LA_____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

| | | |
|---|---|---|
| VIRGINIA McMARTIN and PEGGY ANN BUCKEY, | ) | Appeal No. 2d Civ. B031360 |
| Plaintiffs and Appellants, | ) | |
| vs. | ) | (Los Angeles Superior |
| CHILDREN'S INSTITUTE INTERNATIONAL, KATHLEEN "KEE" MACFARLANE, ABC TELEVISION, INC., and WAYNE SATZ, | ) | |
| Defendants and Respondents. | ) | |

PETITION FOR REVIEW
OF THE DECISION OF THE COURT
OF APPEAL, SECOND APPELLATE DISTRICT
DIVISION FIVE

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## PETITION FOR REVIEW

TO THE HONORABLE MALCOLM LUCAS, CHIEF JUSTICE OF CALIFORNIA, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioners VIRGINIA MCMARTIN and PEGGY ANN BUCKEY respectfully submit their Petition for Review of the published decision of the Court of Appeal, Second Appellate District, Division Five, filed August 10, 1989, a true copy of which is attached hereto as Appendix "A". (See also the unofficial report of the decision at 89 Daily Journal D.A.R. 10239, August 14, 1989.)

### ISSUES PRESENTED FOR REVIEW

Petitioners seek review of the decision affirming the Los Angeles Superior Court, which had sustained without leave to amend the general demurrers based on statutory immunity of

Respondents CHILDREN'S INSTITUTE INTERNATIONAL ("CII") and KATHLEEN "KEE" MACFARLANE to Petitioner's First Amended Complaint. Petitioners' grounds are that:

1. Review is necessary to secure uniformity of decision because the decision below is inconsistent with another recently published decision of the Court of Appeal, Third Appellate District interpreting the same statutory immunity which is at issue here, the Child Abuse and Neglect Reporting Act, Penal Code Sections 11165 et seq.. See, Loeblich v. City of Davis, 89 Daily Journal D.A.R. 11594 (filed September 13, 1989). The Court in Loeblich found the statutory immunity did not apply to the same conduct (e.g., "investigation" as opposed to "reporting") the Court in

McMartin v. CII held was absolutely immune, and Loeblich explicitly rejected, as unjustifiably broad interpretations of the statute and dicta, the two precedents relied upon by the Court in McMartin. Review and resolution of this inconsistency is needed for the guidance of the courts, counsel and the parties concerned with the immunity, especially because this precise issue, as well as closely related ones, is pending in other cases in the trial courts and Court of Appeal; e.g., the related case of Spitler v. CII, Appeal No. B036111, Second Appellate District.

2. The decision is inconsistent with another decision in the same case by a different Division of the same Court of Appeal, Virginia McMartin and Peggy Ann

Buckey v. Wayne Satz and ABC Television, Inc., 2nd Civ. B032679, filed June 13, 1989, Petition for Review in the Supreme Court of the State of California denied on September 7, 1989. The Court of Appeal in McMartin v. Satz, reversed the same trial judge who had sustained without leave to amend demurrers by two other defendants on the basis of statutory and First Amendment privileges and on the same or similar allegation as are at issue here.

3. The decision is based in large part on the view therein that Petitioners offered nothing in the way of proposed amendment at the trial court level or before the Court of appeal to cure the First Amended Complaint to which Respondents' demurrers were sustained without leave to amend. The Court of

Appeal appears to have ignored at least portions of Appellants' briefs, and later the oral argument before it in this case, addressed to proposed amendments to the First Amended Complaint based on changes in the law of the case by virtue of the decision in McMartin et al. v. Satz, et al., and related changes in 1989 in civil rights decisional law which base liability on excessive publicity and inadequate training: e.g. Gobel v. Maricopa County, 867 F.2d 1201 (9th Cir. 1989), and City of Canton, Ohio v. Harris, 109 S.Ct. 1197 (1989). Appellants are partially disabled form addressing this issue by Petition for Rehearing or this Petition for Review because the Court of Appeal has refused to release a transcript or tape recording of the oral argument

before it. There is filed contemporaneously herewith an application under Rule 28(e)(6) to supplement the Petition for Review with materials regarding the oral argument for amendments based on the Satz decision and the federal precedents cited in this paragraph.

In summary, the issues are whether review should be granted (1) to secure uniformity of decision between the Second and Third Appellate Districts with respect to the breadth of the immunity for child abuse reporters; (2) to secure uniformity between Divisions of the Second Appellate District with respect to causes of action in this case; and (3) to settle important questions of law regarding whether the First Amended Complaint stated or could have stated a cause of action against

Respondents based on facts and arguments proposed by Petitioners, particularly claims based on federal civil rights law in the nature of inadequate training and excessive publicity with respect to Respondents' purported child abuse reporter activities.

LEGAL ARGUMENT IN SUPPORT OF PETITION

A. Introduction

The underlying legal issue here is whether a demurrer to the First Amended Complaint should have been sustained without leave to amend. The competing policies are on the one hand, the preference in statute and judicial precedent for a broad reading of plaintiff's pleadings to state a claim as written or through amendment so as to reach a trial on the merits thereof, while

on the other hand, there is the statutory immunity for reporting child abuse in confidence, which must be very broad in order to accomplish its undisputably legitimate goal.

The Court of Appeal here rejected Appellants' arguments that they could sue Respondents for "investigative" or other conduct which was not "reporting" child abuse, and the court found the general demurrers properly sustained due to a failure to plead or propose amendments which avoided an absolute statutory immunity under Penal Code Sections 11165 et seq. based on Krikorian v. Barry 196 Cal.App.3d 1211 (1987), and Storch v. Silverman, 186 Cal.App.3d 671 (1986). In contrast, the court in Loeblich v. City of Davis, 89 Daily Journal D.A.R. 11594

(Third Appellate District, September 13, 1989) reached the opposite conclusion on similar facts and legal arguments. Appellants submit that Loeblich is the proper ruling, but in either event the conflict is so severe it should be resolved; and further, that on the basis of the decision of another Division of the same Court of Appeal in McMartin v. Satz, and the briefs and oral argument here, the First Amended Complaint either stated a cause of action or could have been amended to state one as proposed by Petitioners.

B. THE TEXT OF THE STATUTORY IMMUNITY AT ISSUE:

THE CHILD ABUSE REPORTER LAW

The specific immunity provision at issue is contained in Penal Code Section 11172(a):

> "(a) No child care custodian, health practitioner, employee of a child protective agency, or commercial film and photographic print processor who reports a known or suspected instance of child abuse shall be civilly or criminally liable for any report required or authorized by this article. Any other person reporting a known or suspected instance of child abuse shall not incur civil or criminal liability as a result of any report authorized by this article unless it can be proven that a false report was made and the person knew that the report was false or was made with reckless disregard of the truth or falsity of the report and any such person who makes [a false or reckless report] is liable for any damages caused." [Emphasis added.]

The statute on its face contains at least two types of limitations on its immunity. First, the "blanket" immunity applies

only to designated categories of "reporters", such as child care custodians, which as further defined in Penal Code Section 11165.7 would include CII and its employee MACFARLANE. The Court below correctly noted that the status of Respondents as falling within this category is not disputed. (See Appendix "A", p. 7.) The second limitation on the immunity is the type of activity protected, which is "any report required or authorized by this article." The act of confidentially reporting is obviously the focus of the statute and the immunity, and the issue raised here and below is whether the conduct assailed by Petitioners in their First Amended Complaint and proposed amendments, particularly the romantic relationship

between MACFARLANE and ABC Television newscaster Wayne Satz, is within the scope of such reporting and the immunity.

C. MCMARTIN VS. CII CONFLICTS WITH LOEBLICH VS. CITY OF DAVIS

1. LOEBLICH FOUND INVESTIGATIVE CONDUCT WAS NOT IMMUNE

The Loeblich case involved an allegation of child abuse which resulted in an investigation, accusations and two children being removed from parental custody, after which the investigation was concluded without finding any evidence of child abuse. The parents sued the City, County, police and social workers involved for false imprisonment, libel, slander and emotional distress. The trial court sustained general demurrers without leave to amend based on

the immunity from damages for mandated child abuse reporters under the Child Abuse and Neglect Reporting Act, Penal Code Sections 11165 et seq. The Court of Appeal reversed on the claims other than libel and slander:

> "The [trial] court ruled defendants were absolutely immune from civil liability pursuant to the Child Abuse and Neglect Reporting Act...We shall conclude this was error." (89 Daily Journal D.A.R. at 11594)

The Loeblich court went on to expressly reject two reported decisions on the immunity as being overbroad interpretations of the statute and dicta:

> "We do not agree that the Act is reasonably susceptible to the broad interpretation suggested by Storch and Krikorian. Initially we note those expansive interpretations were dicta, unnecessary to the holdings in those cases." Loeblich, supra at 11595.

> "Thus, by its plain and unambiguous terms, the immunity conferred by the Act is limited to injury caused by the act of reporting suspected child abuse..." Loeblich, supra at 11596.
> "Thus, despite strong policy arguments for extending immunity to investigative activity generally, it is clear that beyond the act of reporting, the Legislature chose to protect only the related incidental conduct specifically described in the statute." Loeblich, supra at 11596.

Loeblich distinguished Storch and Krikorian on the basis that all the conduct at issue there stemmed from the act of reporting, as opposed to the Loeblich complaint which had allegations of false imprisonment, improper medical examination, improper questionning of the child by "unqualified individuals" and defamation:

> "...all of this was arguably in connection with an investigation

> and not a direct result of a report required by the Act." Loeblich, supra at 11596.

The First Amended Complaint here, as is, contains the types of allegations which under Loeblich would state a cause of action despite the statutory immunity. For example, paragraph 6 at page 3 - 4 of the Clerk's Transcript, alleges that CII, acting through MACFARLANE, "violated all applicable standards for interviewing alleged child abuse victims, including intimidating the children into make false charges against plaintiff."

2. MCMARTIN FOUND INVESTIGATIVE CONDUCT WAS IMMUNE

Whereas Loeblich found that methodology in the investigation of alleged child abuse could be conduct

outside the immunity, the Court of Appeal in McMartin v. CII found exactly the opposite:

> "Even if, as plaintiffs allege, CII and MacFarlane used unorthodox methods in interviewing the children, defendants are not removed form the protection afforded them by section 11172. The manner in which the alleged child abuse is discovered is irrelevant as long as the discovery occurs within the scope of the interviewing observing reporters' employment or in their professional capacity as children's services providers. (Krikorian v. Barry, supra, 196 Cal.App.3d at p. 1223.)" (Appendix "A", p. 9.)

D. THE DECISION BELOW IS INCONSISTENT WITH THE DECISION IN THE RELATED APPEAL, MCMARTIN VS. SATZ AND ABC NEWS

Petitioners believe the existence of the opinion in McMartin v. Satz was brought to the attention of the court below at oral argument, but it is not

mentioned in the published decision. Interestingly, however, although the briefs on the instant appeal identify by caption and text that this was an appeal only against CII and MACFARLANE, Division Five, while ignoring the existence and content of Division One's decision, has added Satz and ABC (but not any of the other CII personnel) to the caption in this appeal.

The earlier Division One opinion reversed the same trial judge that Division Five affirms, for sustaining demurrers without leave to amend as to the First Amended Complaint as further amended by an Amendment to First Amended Complaint. The difficulty with reconcil- ing the two opinions is that they are dealing with the same

allegedly tortious conduct based on a romantic relationship between a newsman and a child abuse reporter. It makes no sense to permit Petitioners to amend to show how the media half of that relationship acted outside the First Amendment type privileges, while at virtually the same time denying leave to amend to allege the same facts against the child abuse reporter half of the relationship to show her non-immune conduct.

Even more significantly, as pointed out at oral argument before the Court of Appeal here, MACFARLANE and CII's access to and use of the media, is at the very heart of the claims against those Respondents and outside the immunities claimed by them. Not only is publicizing

the child abuse investigation for personal gain inconsistent with the statutory immunity which protects confidentiality, it is in and of itself a basis for a civil rights claim.

The First Amended Complaint contains multiple allegations about Respondents' disclosures of confidential information and publicizing of their investigation (e.g., paragraphs 9 and 30, Clerk's Transcript, pp. 30 and 37). As noted in the recent case cited by Petitioners at the appellate oral argument here, that is the basis for a civil rights claim against a prosecutor as upheld under the heading, "False Statements to News Media," in Gobel v. Maricopa County, 867 F.2d 1201, 1205 (9th Cir. 1989). By Analogy, the same rule, if not an even

more liberal one, should apply to publicity generated by a mandated child abuse reporter, who unlike the prosecutor has special mandates for confidentiality.

Surely there is some absurdity in upholding immunity for conduct which is the exact opposite of what the immunity is supposed to protect.

E. PETITIONERS PRESENTED AN ADEQUATE BASIS FOR AMENDMENT

Although the hearing on Respondents' general demurrers was the first judicial test of the allegations against them by Petitioners, no opportunity to amend was granted. The Court of Appeal justified that result on the ground that despite requests to plead facts based on the MACFARLANE-SATZ romance:

> "Plaintiffs, however, failed to bring before the trial court and

> have failed to bring before this court any such facts.: (Appendix "A", p. 7.)

Petitioners submit that the Court of Appeal misconstrued the record.

First, as that court implicitly conceded (Appendix "A", p. 9, n. 5), those facts are indeed alleged in the First Amended Complaint, in paragraph 49 of the Ninth Cause of Action and in the Fifth Cause of Action for a RICO violation. However, those facts were disregarded below because paragraph 49 was pleaded against the other half of the offending liaison, defendant Wayne Satz (and his employer ABC News), but not against CII or MACFARLANE, although she is mentioned by name therein. Paragraph 49 alleges as part of the claim against the media defendants for outrageous

conduct that SATZ engaged in a conspiracy with MACFARLANE, based on their "personal involvement throughout the investigation and criminal proceedings" in which the defendants, "coached testimony, participated in leaking evidence subject to court protective orders and otherwise manipulated and distorted events so as to report thereon to SATZ and MACFARLANE's personal advantage..." (Clerk's Transcript, p. 43: 6-13.)

The court rejected similar facts about MACFARLANE, which unlike paragraph 49 are actually pleaded against MACFARLANE in paragraph 30 of the fifth or RICO cause of action, because they failed to state a RICO claim. The court, in the same footnote 5 on page 9, also criticized the facts in the RICO claim

for alleging MACFARLANE leaked protected information to Satz and "suppressed unspecified information." On the contrary, that information was specified in paragraph 30:

> "...and by Defendants' suppression, destruction and manipulation of evidence such as that discrediting the mental stability and veracity of Judy Johnson, the initial complaining witness against Plaintiff in 1983." (Clerk's Transcript, p.37:17-20.)

Second, Petitioners went even further in their argument in the trial court about what additional facts they could allege to support the civil conspiracy claim against CII and MACFARLANE, attaching to their Memorandum of Points and Authorities, as an example, an amendment to a related complaint based on the same series of events, Spitler v.

County of Los Angeles et al., which tells more precisely that one of the items MACFARLANE suppressed was her knowledge that complaining witness Johnson had made both prior and subsequent false reports of child abuse. (See Clerk's Transcript, p. 359:20-25.) Similarly, the same sample amendment given to the trial court contains allegations of state constitutional violations which the court of Appeal decision says Petitioners failed to present to the trial court. See Clerk's Transcript, p. 359:3-4.

Third, an additional fact (and one that the Court of Appeal conceded Petitioners offered to the trial court) is the lead-in to theories advanced in appellate oral argument on why

Petitioners either had stated a claim or could if allowed to amend. The opinion notes on page 21 that at the trial court level plaintiffs offered to amend to plead that MACFARLANE was unlicensed as a child care professional, but the appellate court finds that claim is not basis for anything. However, if Loeblich is correct, the presence of unqualified interviewers is an element of conduct outside the scope of the immunity. Moreover, that fact, coupled with the multiple allegations in the First Amended Complaint (e.g., paragraphs 6, 17 and 20), regarding defendants', including CII and MACFARLANE, failure to abide by established and legally mandated procedures for conducting child abuse

investigations and interviews, is certainly a basis for a civil rights claim for inadequately trained and supervised personnel as recently articulated by the United States Supreme Court in City of Canton, Ohio v. Harris, 109 S.Ct. 1197, 1200-1202 (1989). See also, Berquist v. County of Cochise, 806 F.2d 1364, 1369-1370 (9th Cir. 1986).

In concluding its opinion at page 21, the Court of Appeal stated that:

> "No proposed amendment to this action was offered in plaintiffs' opposition to the demurrer of CII and MacFarlane.:

As shown above, that critique is simply not true in light of the example of an amendment offered at pages 245, 357-362 of the Clerk's Transcript. And even if it were true, the court below has

essentially conceded that Petitioners had already pleaded the right facts but in the wrong places in the First Amended Complaint, and on that basis under traditional principles for evaluating general demurrers, leave to amend should have been granted because, "reading it as a whole and its parts in their context," there are allegations of conduct which are outside any immunity. Blank v. Kirwan, 39 Cal.3d 311, 318 (1985). See also, Barquis v. Merchants' Collection Assn., 7 Cal.3d 493, 396 (1970) which indicates that if a claim is stated on "any legal theory", the demurrer should have been overruled and the courts below should be reversed.

CONCLUSION

Therefore, Petitioners respectfully submit that review should be granted to resolve conflicts between the Second and Third Appellate Districts on the Child Abuse Reporter immunity; and to resolve conflicts between the Fifth and First Divisions of the Second Appellate District on First Amended Complaint in the McMartin case; and further, that reversal is warranted either because the First Amended Complaint stated a cause of action against Respondents as written, or as it could have been amended in accordance with the amendments and arguments offered in considerable detail and with examples at the trial and appellate level.

Dated: September 18, 1989

JAMES H. DAVIS
A Law Corporation
By_____
Attorneys for
Appellants

[Appendix "A" attached to this document is included herein as Appendix "B" to the Petition for Certiorari]

# APPENDIX G

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL
Second Appellate District, Division Five,
No. B031360
S012098

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

---

VIRGINIA McMARTIN,
Et Al., Appellants

v.

CHLDREN'S INSTITUTE
INTERNATIONAL Et Al.,
Respondents.

Superior Court
FILED
Nov 1 1989
Robert Wandruff
Clerk
Deputy

---

Petition for review DENIED.

LUCAS

Chief Justice

# APPENDIX H

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE SECOND APPELLATE DISTRICT
DIVISION: 5

Law Offices of James H. Davis
James A. Quinn
2960 Wilshire Blvd
Yorkshire Penthouse
Los Angeles, CA 90010

Re: McMartin & Buckey
vs.
Childrens Institute International
2 Civil B031360

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 08/10/89 is now final.

* * Affirmed in Full. * *

Parties To Bear Own Costs On Appeal.

Nov 20 1989

Robert N. Wilson, Clerk
By: J. Lepo
Deputy Clerk

(2)



No. 89-1257

In the

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM 1989

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VIRGINIA McMARTIN and
PEGGY ANN BUCKEY,
*Petitioners,*

v.

CHILDREN'S INSTITUTE INTERNATIONAL,
and KATHLEEN "KEE" MACFARLANE,
*Respondents.*

---

**ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE**

---

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CHARLES P. DIAMOND*
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*Counsel for Respondents*

**Counsel of Record*

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40 pp

## RESPONDENTS' RESTATEMENT OF THE QUESTION PRESENTED

Whether the California Court of Appeal correctly held that therapists who had been retained by a prosecutor to evaluate claims of child abuse and to assist the prosecutor in determining whether to initiate criminal proceedings were entitled to prosecutorial immunity under federal law from actions under 42 U.S.C. Section 1983 under the facts pleaded by Petitioners.

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In the

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM 1989

---

VIRGINIA McMARTIN and
PEGGY ANN BUCKEY,
*Petitioners,*

vs.

CHILDREN'S INSTITUTE INTERNATIONAL,
and KATHLEEN "KEE" MACFARLANE,
*Respondents.*

---

**ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE**

---

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

## JURISDICTION

The judgment of the Court of Appeal of California, Second Appellate District, Division Five, was entered on August 10, 1989, affirming dismissal of petitioners' action. On November 1, 1989 the Supreme Court of California denied a petition for review. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

## STATUTE INVOLVED

42 U.S.C. § 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

Petitioners Virginia McMartin and Peggy-Ann Buckey, formerly teachers at the McMartin Preschool in Manhattan Beach, California, were indicted by the Los Angeles County Grand Jury on March 22, 1984 for participating in lewd or lascivious acts with McMartin preschoolers in violation of California Penal Code Section 288(a). After an 18-month preliminary hearing, Petitioners and their five codefendants were bound over for trial.[1]

---

[1]This required a finding by the presiding Magistrate that there was sufficient cause to believe that a public offense had been committed and that Petitioners were guilty thereof. California Penal

The Los Angeles County District Attorney dismissed the charges against Petitioners and three of their codefendants on January 21, 1986.

Respondent Children's Institute International ("CII"), a nonprofit child welfare organization, first became involved in the McMartin Preschool prosecution at the specific request of the Los Angeles County District Attorney. CII personnel, including the chief of its child abuse diagnostic unit, Respondent Kathleen MacFarlane, were enlisted to evaluate former McMartin Preschool students, including those who ultimately testified against Petitioners at their preliminary hearing.

Petitioners' state court civil action against Respondents arose from the professional services that Respondents rendered to the District Attorney. Petitioners' first amended complaint alleged in Paragraph 3 that the Los Angeles County District Attorney and the Manhattan Beach Police "retained" CII after the District Attorney had commenced his involvement in the case "to interview, examine, interrogate and evaluate the alleged victims of child abuse." Petition ("Pet.") pp. E4-E6. That same paragraph stated that CII's mission was to determine "whether child abuse had occurred and who the perpetrators were." In Paragraph 6, Petitioners claimed that CII's allegedly unfounded suspicions of child abuse were reported to the authorities. Pet. pp. E6-E8. Paragraph 7 alleged that the District Attorney based his decision to indict Petitioners, *inter alia*, "[on] the reports of [CII and its agents]." Pet. p. E8.

On this basis, Petitioners alleged against CII,

---

Code Section 872.

Ms. MacFarlane, the County of Los Angeles and others a variety of state law tort claims, a RICO claim and a claim purportedly brought under 42 U.S.C. Section 1983. Respondents demurred to the Section 1983 claim on the ground that they were absolutely immune from Section 1983 liability because, since they were charged with acting in a quasi-prosecutorial capacity, that conduct was absolutely privileged. The Los Angeles County Superior Court sustained the demurrer without leave to amend. The California Court of Appeal affirmed in a published decision. McMartin v. Children's Institute International, 212 Cal. App. 3d 1393 (1989). The California Supreme Court denied review on November 1, 1989.

## ARGUMENT

### THIS IS NOT AN APPROPRIATE CASE FOR SUPREME COURT REVIEW

Rule 17 of the Supreme Court Rules provides that "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." In describing general guidelines for the court's exercise of its discretion, the rule states in relevant part that certiorari is most likely to be granted:

> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or federal court of appeals has decided an important question of federal law which has not been, but should

be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

None of these circumstances is present in this case.

A. The California Court Of Appeal's Decision Is Wholly Consistent With Federal Law.

A prosecutor is absolutely immune from Section 1983 claims for actions that are "intimately associated with the judicial phase of the criminal process . . . ." Imbler v. Pachtman, 424 U.S. 409, 430 (1976). Here, Respondents were deputized by the prosecutor to interview and evaluate potential witnesses and assist in determining whether, and against whom, to initiate criminal proceedings. Petitioners concede that "[t]he scope of immunity available to Respondents is analogous to that of the prosecutor under Imbler . . . ." Pet. p. 17. Accordingly, the California court correctly held that Respondents enjoy absolute prosecutorial immunity under the facts pleaded by Petitioners.

The decision below is consistent with the application of Imbler by other federal courts faced with similar claims as made here against therapists and other child welfare workers. For example, in Myers v. Morris, 810 F.2d 1437 (8th Cir.), cert. denied 484 U.S. 828 (1987), a county prosecutor was sued under 42 U.S.C. Section 1983 for, inter alia, "questioning children . . . [and using] the interviews to coerce perjured statements from young and vulnerable witnesses." Id. at 1449-1450. The 10th Circuit held that such activity was absolutely immune from Section 1983 liability because conferring with potential witnesses for the purpose of determining whether to initiate proceedings and following up on leads

presented in interviews to "[determine] the complicity of others," Id. at 1451, were "an integral part of [the prosecutor's] advocatory functions, i.e., her ongoing prosecutorial responsibilities to decide whom to charge and to prepare for the presentation of her cases." Id. See also Coverdell v. Department of Social and Health Services, 834 F.2d 758 (9th Cir. 1987) (social worker who gave affidavit to prosecutor who based a dependency court filing on it entitled to absolute immunity from Section 1983 claims); Meyers v. Contra Costa County Department Of Social Services, 812 F.2d 1154 (9th Cir.), cert. denied 484 U.S. 829 (1987) (social worker who supervised an investigation and filed a petition in dependency court entitled to absolute immunity from Section 1983 claims for those actions); Mazor v. Shelton, 637 F. Supp. 330 (N.D. Cal. 1986) (social worker who made a report to a sheriff who took a child into custody entitled to absolute immunity from Section 1983 claims; but see Doe v. County of Suffolk, 494 F. Supp. 179 (E.D.N.Y. 1980) (social worker not absolutely immune from Section 1983 liability for filing a Family Court petition charging child neglect).

Citing England v. Hendricks, 880 F.2d 281 (10th Cir. 1989) (a municipality's failure to train may serve as a basis for Section 1983 liability in some circumstances) and City of Canton, Ohio v. Harris, ____ U.S. ____, 109 S. Ct. 1197 (1989) (District Attorney's statements to the press entitled at most to qualified immunity), petitioners appear to argue that the California court erred by ignoring exceptions to the Imbler rule. However, it is clear from Petitioners' complaint why they could not and cannot bring into play theories of liability derived from City of Canton or England: the only act undertaken by CII under

color of state law[2] was its advice to the District Attorney that charges be brought -- not Ms. MacFarlane's alleged unauthorized disclosures to a reporter, or CII's failure to train its personnel.[3] Indeed, only CII's evaluation of the complaining children contributed to the injury that Petitioners seek to redress, as the California court

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[2]Petitioners described their Section 1983 injury thusly:

> "Specifically, Plaintiff alleges that with respect to the events alleged in paragraph 19, each of the Defendants, acted under color of state law, as a matter of governmental policy of CITY and COUNTY, recklessly and in a gross and negligent manner, and with deliberate indifference towards Plaintiffs' rights, privileges, and immunities, and filed to protect Plaintiff with procedural due process, inflicted cruel and unusual punishment upon Plaintiff while in Defendants' custody and control and failed to follow Defendants' own statutory and regulatory requirements designed to protect Plaintiff as required by law and as comparable to that which Defendants made available to other similarly situated persons within Defendants' jurisdiction." Pet. pp. E17-E18.

[3]Even if Respondents' advice to the prosecutor was made in bad faith and in violation of "substantially all standards for interviewing alleged child abuse victims," Pet. p. E7, Petitioners' complaint is no more worthy of review than Schoenfield v. County of Humboldt, 875 F.2d 870 (9th Cir.), cert. denied, 58 U.S.L.W. 3468 (U.S. Jan. 22, 1990). Petitioners dismiss the denial of a petition for a writ of certiorari in that case by characterizing Schoenfield as "essentially a malicious prosecution case with some failure to train allegations," Pet., p. 12. That description aptly describes their own complaint.

observed:

> "[Petitioners'] complaint alleged only that [Respondents'] role in contributing to the injury complained of was their advice to the District Attorney that criminal charges should be brought." 212 Cal. App. 3d at 1405; Pet. pp. B31-B32.

Equally important, the California court's opinion clearly shows that Petitioners were given every opportunity to amend their first amended complaint to plead facts alleging nonprivileged conduct actionable under Section 1983, but they were unable to do so.

> "[Petitioners] have failed to demonstrate, by proposed amendments to their pleadings, their briefs or in oral argument, that other facts or circumstances exist, either prior to or after the [Respondents'] alleged prosecutorial conduct, that would deny defendants the protection of the immunity provided for such legally sanctioned activity . . . . " 212 Cal. App. 3d at 1405; Pet. p. B32.

Having failed to convince the trial court and the California Court of Appeal that they can amend their complaint to state a viable claim against Respondents, Petitioners now in effect ask the United States Supreme Court to decide whether to give them a third chance to amend. That question is manifestly inappropriate for Supreme Court review.

B. The State Court Did Not Decide An Important Or Unsettled Question Of Federal Law.

Petitioners improperly attempt to characterize the Court of Appeal's decision as one deciding an important federal issue by stating the question presented for review as: "Whether the California Child Abuse and Neglect Reporting Act, California Penal Code § 11164 et seq., provides complete immunity from liability for any and all claims arising under the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983, as alleged in Petitioners' First Amended Complaint." Pet. p. i. But that issue is not present anywhere in this case.

The question argued in respondents' demurrer to the first amended complaint and the issue decided by the California Court of Appeal was whether petitioners' 42 U.S.C. § 1983 claims are barred by respondents' absolute federal immunity. Res. App. A. The Court of Appeal, applying only established federal law, held that respondents are entitled to absolute immunity from claims made under 42 U.S.C. § 1983. Pet. pp. B29-B31.

The California Court of Appeal did not consider or decide the scope of the relationship, if any, between Respondents' absolute immunity under federal law and the absolute immunity provided by California Penal Code Section 11164. The "question presented" as stated by Petitioners is hypothetical, not real.

## CONCLUSION

This Court has consistently refused to grant a writ of certiorari "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties." Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923). This petition presents no unsettled issues of federal law or issues of public importance. Accordingly, the Petition For Writ Of Certiorari should be denied.

DATED: March 5, 1990

Respectfully submitted,

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# *APPENDIX A*

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Attorneys for Defendants
Children's Institute International
and Kathleen MacFarlane

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

| | |
|---|---|
| VIRGINIA McMARTIN and PEGGY-ANN BUCKEY,<br><br>Plaintiffs,<br><br>vs.<br><br>COUNTY OF LOS ANGELES; CITY OF MANHATTAN BEACH; CHILDREN'S INSTITUTE INTERNATIONAL; KATHLEEN "KEE" ASTRIDHAGAR, BRUCE WOODLINE; ROBERT PHILOBOSIAN; WAYNE SATZ; ABC TELEVISION, DOES 1 THROUGH 200<br><br>Defendants. | Case No. C 601854<br><br>MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANTS CHILDREN'S INSTITUTE INTERNATIONAL AND KATHLEEN MAC FARLANE IN SUPPORT OF DEMURER TO FIRST AMENDED COMPLAINT<br><br>DATE: October 23, 1987<br>TIME: 9:00 A.M.<br>DEPT: 84<br>TRIAL DATE: None<br><br>[JUDGE TURNER, DEPT. 83 HAS RECUSED PURSUANT TO C.C.P. § 170 (a) (b) (c)] |

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## I. PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

Plaintiffs Virginia McMartin and Peggy-Ann Buckey, formerly teachers at the McMartin Preschool in Manhattan Beach, California, were indicted by the Los Angeles County Grand Jury on March 22, 1984 for participating in the molestation of numerous McMartin preschoolers in violation of Penal Code Section 288(a) (lewd or lascivious act on a child under 14 years old). After an 18-month preliminary hearing, plaintiffs and their five codefendants were bound over for trial, plaintiffs for a number of counts of violation of Penal Code 288(a) and one count of violation of Penal Code Section 182 (conspiracy). The Los Angeles County District Attorney dismissed the charges against plaintiffs on January 21, 1986.[4]

By this action, plaintiffs seek retribution from those they perceive as responsible for the institution of criminal proceedings against them, including the physicians and psychotherapists of Children's Institute International ("CII") who assisted the prosecution in uncovering the McMartin Preschool molestations. CII, a nonprofit child welfare organization which for the past sixty years has dedicated itself to preserving families through the treatment and prevention of child abuse and neglect, first became involved in the McMartin Preschool prosecution at the specific request of the Los Angeles County District Attorney. CII personnel including defendant Kathleen MacFarlane, were enlisted in October, 1983 to conduct diagnostic evaluations of several former McMartin

---

[4]See People v. Buckey, et al., Los Angeles Municipal Court Case Nos. A 753005 and A 750900.

Preschool students. During the ensuing months, nearly 400 former McMartin students, including those who testified against plaintiffs at their preliminary hearing, were seen by CII therapists and/or physicians. Throughout the evaluation process CII complied with the provisions of California Penal Code Section 11166 requiring it to report any instances of suspected child abuse to the proper authorities.

The sole ostensible basis for plaintiffs' suit against CII[5] is the Section 11166 reports of suspected child abuse naming plaintiffs that CII personnel prepared for and furnished to the District Attorney in connection with the investigation and prosecution of the McMartin defendants. Thus, the amended complaint alleges in paragraph 4 that the Los Angeles District Attorney "retained" CII "to interview, examine, interrogate and evaluate the alleged victims of child abuse." That same paragraph stated that CII's mission was to determine "whether child abuse had occurred and who the perpetrators were." In paragraph 6, plaintiffs claim that CII's allegedly unfounded suspicions of child abuse were reported to the authorities. Paragraph 7 alleges that the District Attorney based his decision to indict plaintiffs, inter alia, "[on] the reports of [CII and its agents]."

---

[5]Although the particular target defendants in some of plaintiffs' thirteen causes of action are not clearly identified, plaintiffs appear to allege state law causes of action against CII for defamation (eighth cause of action), intentional infliction of emotional distress (seventh cause of action), conspiracy (third cause of action), battery (eleventh cause of action), interference with prospective advantage (twelfth cause of action), invasion of privacy (tenth cause of action), negligent infliction of emotional distress (thirteenth cause of action), and declaratory relief (fourth cause of action). Plaintiffs also allege claims under 42 U.S.C. § 1983 (second cause of action) and 18 U.S.C. §§ 1961 et seq. (RICO) (fifth cause of action).

As Judge Woods ruled in disposing of nearly identical complaints filed by two of plaintiffs' codefendants,[6] the reports of suspected child abuse on which plaintiffs seeks to predicate CII's liability are reports that CII was engaged by the District Attorney to make and which CII would have been compelled to make pursuant to the mandatory child abuse reporting requirements contained in Penal Code Section 11166. These reports serve a compelling public interest, and accordingly, CII was absolutely privileged to make them. There is no cognizable basis for plaintiffs' claim against CII, and CII's demurrers should therefore be sustained.

## II. PLAINTIFFS' STATE LAW CLAIMS ARE INSUFFICIENT BECAUSE EACH IS BASED ON REPORTS OF SUSPECTED CHILD ABUSE THAT CII WAS ABSOLUTELY PRIVILEGED TO MAKE UNDER CALIFORNIA PENAL CODE SECTION 11172

Penal Code Section 11166 requires any child welfare worker such as the CII therapists that interviewed the McMartin youngsters to "report [any] known or suspected instance of child abuse to a child protective agency immediately. . . ." The failure to make such a report is a misdemeanor under Penal Code Section 11172(e). Plaintiffs' complaint makes clear that it was a series of such reports produced by CII that led to plaintiffs'

---

[6] See Notices of Ruling, filed September 14, 1987 in Spitler v. Los Angeles, (L.A. Super. No. 603958) and Jackson v. Los Angeles, (L.A. Super. No. 619156), of which the Court has been requested to take judicial notice, copies of which are attached as Exhibit B.

indictment and the injuries for which they seek redress here.

The Child Abuse Reporting Law extends to a "child care custodian, medical practitioner, nonmedical practitioner, or employee of a child protective agency." Penal Code § 11166. To be a "child care custodian," the facilities need only be licensed to care for children. Id. § 11165.

CII is such an institution. The Court has before it on CII's request for judicial notice pursuant to Evidence Code Section 452, licenses continuously in effect since 1981 to operate a community clinic for the psychological treatment of (among others) children; and since 1982 to operate a residential group home for the treatment and care of children. (Exhibit A to the Request to Take Judicial Notice.)[7] These licenses conclusively establish CII as a "child care custodian," defined by the statute to mean a "community care facilit[y] licensed to care for children." See Penal Code § 11165.

It is now clear beyond cavil that reports of suspected child abuse made by a child care custodian pursuant to Penal Code Section 11166 are absolutely privileged:

> "No child care custodian, medical practitioner, nonmedical practitioner, or employee of a child protective agency who reports a known or suspected instance of child abuse shall be civilly or criminally liable for any report required or authorized by this

---

[7]Although not immediately relevant for purposes of this suit but noted for sake of completeness, CII has also been licensed since 1986 to operate an extended day care facility for 35 children.

article." Penal Code § 11172(a).

As the decision in Storch v. Silverman, 186 Cal. App. 3d 671 (1986), makes clear, Penal Code Section 11172 admits of no ambiguity concerning the immunity that attaches to the making of a report of suspected child abuse. Storch was an action for medical malpractice and negligent infliction of emotional distress based on an allegedly negligent diagnosis that a child was a victim of abuse, and on a report under Penal Code Section 11166 of such abuse. The court held that Penal Code Section 11172 provides "mandated reporter[s]" absolute immunity from civil liability for reporting an instance of suspected child abuse -- even if the report is "maliciously and knowingly . . . false." 186 Cal. App. 3d at 681. Justice Arabian wrote (at p. 682):

> "It is evident that, in the tension between the grant of civil immunity occasioned by a duty to report and the specter of a false report, some sacrifice is borne by those who may be wrongfully investigated but unable to seek legal redress.
>
> " . . .
>
> "In the enactment of the Child Abuse Reporting Law, [the Legislature] has wisely provided a haven of refuge to those who rescue the helpless.
>
> "When engaged in the alleviation of pain from those who suffer, the law knows no finer hour."

Storch is indistinguishable from the allegations here. As in Storch, plaintiffs allege damages flowing from mandated reports of child abuse. As in Storch, plaintiffs claim that the reports were false. Hence, as did the trial

court in Storch, the claims of plaintiffs must be dismissed.

This result is not altered by plaintiffs' allegation that CII's conclusions were based on allegedly unprofessional interviewing techniques. For as Judge Arabian made clear in Storch, immunity does not turn on whether the report of child abuse is accurate or whether it is founded on a legitimate basis. The Storch plaintiffs had similarly urged that because immunity exists only for "required reports" of child abuse and because only instances of abuse that the reporter "knows [of] or reasonably suspects" need be reported, immunity did not extend to reports that are "negligent or knowingly false." 186 Cal. App. 3d at 678. The Court of Appeal rejected this argument, noting that because "[t]he issue of the reasonableness of the reporter's suspicions would potentially exist in every reported case," the proposed construction would "render[] the immunity statute virtually meaningless." In language instructive here, the court added:

> "The legislative scheme is designed to encourage the reporting of child abuse to the greatest extent possible to prevent further abuse. Reporters are required to report child abuse promptly and they are subject of criminal prosecution if they fail to report as required. Accordingly, absolute immunity from liability for all reports is consistent with that scheme. Id. at 678-79.

## III. PLAINTIFFS' STATE LAW CLAIMS ARE INSUFFICIENT FOR THE ADDITIONAL REASON THAT CII'S REPORTS ARE ABSOLUTELY PRIVILEGED UNDER CALIFORNIA CIVIL CODE SECTION 47(2) AS HAVING BEEN MADE IN CONNECTION WITH AN ONGOING CRIMINAL INVESTIGATION

### A. CII's Actions And Reports That Form The Bases Of Plaintiffs' State Law Claims Are Absolutely Privileged Under Civil Code Section 47(2)

Plaintiffs acknowledge that CII's reports were made at the request of the District Attorney who relied on them rather than conduct his own investigation. (Amended Complaint ¶¶ 4 & 7.) Reports made in these circumstances form part of the preparation of a criminal prosecution and are absolutely privileged under Civil Code Section 47(2).[8]

The absolute privilege of Civil Code Section 47(2) "attaches to any publication that has any reasonable relation to the action and is made to achieve the objects of the litigation, even though published outside the courtroom and no function of the court or its officers is involved." Rosenthal v. Irell & Manella, 135 Cal. App. 3d 121, 126 (1982). When a publication is absolutely privileged, "there is no liability, even though it is made with

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[8]Civil Code Section 47(2) provides in part that:

> "a privileged publication or broadcast is one made . . . [in] any . . . judicial proceeding . . . ."

actual malice. . . ." Berman v. RCA Auto Corp., 177 Cal. App. 3d 321, 325 (1986).

Block v. Sacramento Clinical Labs, Inc., 131 Cal. App. 3d 386 (1982), is on all fours with the facts alleged by plaintiffs. Block, was an action for "professional negligence." The San Joaquin County Sheriff-Coroner, as part of its investigation into the death of a child, submitted blood samples to private toxicological laboratory for analysis. Incorrect results were communicated to the District Attorney who used them as the basis for charges of murder and child neglect. The error was discovered at the preliminary hearing and the criminal complaint was dismissed on the District Attorney's motion. The defendant then sued those responsible for her prosecution, including the private laboratory which had prepared the erroneous report. 131 Cal. App. 3d at 387-88.

On appeal from an order sustaining demurrers to the complaint, the Court of Appeal held that the communication between the private laboratory and the authorities -- the injurious falsehood on which the lawsuit was based -- was absolutely privileged under Civil Code Section 47(2):

> "[The toxicologist] performed and communicated the calculations upon the request of the office of the district attorney in furtherance of its investigation whether there was probable cause to initiate criminal charges relating to the infant's death. [W]hen the communication has some relation to a proceeding that is actually contemplated in good faith and under serious consideration by . . . a possible party to the proceeding, the communication is privileged. (Rest. 2d Torts, supra, § 588, com. e, at p. 251; see Izzi v.

> Rellas (1980) 104 Cal. App. 3d 254 at p. 262 [163 Cal. Rptr. 689] ['the working definition of 'judicial proceedings' . . . include[s] proceedings which have the real potential for becoming a court concern.']; Ascherman v. Natanson (1972) 23 Cal. App. 3d 861, 865 [100 Cal. Rptr. 656] ['it is . . . well settled that the absolute privilege in both judicial and quasi-judicial proceedings extends to preliminary conversations and interviews between a prospective witness and an attorney if they are in some way related to or connected with a pending or contemplated action. [Citations.]'] And, notwithstanding that the privilege is most often asserted in civil disputes, the privilege is applicable to 'proposed litigation, either civil or criminal.' (Rest. 2d Torts, supra, § 588, com. b, at p. 250.)"

131 Cal. App. 3d at 393-394.

As in Block and Storch, plaintiffs charge the investigator (CII) with the communication of erroneous information to the prosecuting authorities in connection with a contemplated criminal proceeding. CII's communications to the District Attorney in the McMartin criminal case -- even if incorrect -- are absolutely privileged under Civil Code Section 47(2).

B. The Absolute Privilege Of Civil Code Section 47(2) Bars All Of Plaintiffs' State Law Claims

The decision in Block makes it manifestly clear that the absolute privilege of Civil Code Section 47 bars all of plaintiffs' state law causes of action -- regardless of their title or nature.

> "Subsequent cases [to Albertson v. Raboff, 46 Cal. 2d 375 (1956)] have applied the privilege to defeat tort actions which, however labelled and whatever the theory of liability, are predicated upon the publication in protected proceedings of an injurious falsehood."

131 Cal. App. 3d at 390-91 (footnotes omitted). The cases cited in Block cover the spectrum of intentional and negligent torts alleged in the causes of action directed toward CII. See Rivas v. Clark, 38 Cal. 3d 355 (1985) (intentional infliction of emotional distress and invasion of privacy); Agostini v. Strycula, 231 Cal. App. 2d 804 (1965) (inducing breach of contract); Kachig v. Boothe, 22 Cal. App. 3d 626 (1971) (infliction of mental distress); Pettitt v. Levy, 28 Cal. App. 3d 484 (1972) (fraud, negligent misrepresentations, negligence and intentional infliction of emotional distress); Scott v. McDonnell Douglas Corp., 37 Cal. App. 3d 277 (1974) (defamation, interference with contractual relationship and intentional infliction of emotional distress); Lerette v. Dean Witter Organization, Inc., 60 Cal. App. 3d 573 (1976) (intentional infliction of emotional distress); Brody v. Montalbano, 87 Cal. App. 3d 725 (1978) (interference with prospective economic advantage); Portman v. George McDonald Law Corp., 99 Cal. App. 3d 988 (1979) (negligent misrepresentation); Rosenthal v. Irell & Manella, 135 Cal. App. 3d 121 (1982) (intentional infliction of emotional distress, inducing breach of contract, interference with prospective economic advantage); and Lebbos v. State Bar, 165 Cal. App. 3d 656 (1985) (interference with contractual relations, interference with prospective economic advantage, intentional infliction of emotional distress and negligence).

## IV. PLAINTIFFS' 42 U.S.C. SECTION 1983 AND CONSPIRACY CAUSES OF ACTION AGAINST CII ARE BARRED BY CII'S ABSOLUTE FEDERAL IMMUNITY

Plaintiffs allege that CII was retained to "assess[] whether in fact child abuse had occurred, the nature thereof and the identity of the perpetrator." (Amended Complaint ¶ 5.) This information was sought by the District Attorney, the complaint alleges, to assist in deciding whether "to present to [the] Grand Jury the name of Plaintiff [sic], among others, for indictment for the alleged child abuse at Preschool." (Id. ¶ 7.) Based on these allegations, plaintiffs contend that CII acted under color of state law -- specifically, as an investigative arm of the District Attorney -- and thus can be held accountable under federal law for violating their civil rights.

But viewed as an adjunct of the prosecution, as plaintiffs allege, CII is entitled to the same immunity from 42 U.S.C. Section 1983 claims as the District Attorney enjoys in performing its investigatory and prosecutorial functions.[9] See, e.g., Lawyer v. Kernodle, 721 F.2d 632,

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[9]42 U.S.C. 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

635 (8th Cir. 1983) (physician engaged by county coroner to perform autopsy "clearly enjoyed the same [Section 1983] immunity privilege the coroner could assert").

A prosecutor is absolutely immune from Section 1983 claims based on actions that are "intimately associated with the judicial phase of the criminal process . . . ." Imbler v. Pachtman, 424 U.S. 409, 430 (1976). Interviews of witnesses "are part of the duties of a prosecutor, and immune from liability under section 1983." Lebbos v. State Bar, 165 Cal. App. 3d 656, 666 (1985). See Myers v. Morris, 810 F.2d 1437 (8th Cir. 1987) (prosecutor absolutely immune from suit for interviewing children in connection with "the decision whether to initiate a prosecution [for child abuse] or in the preparation necessary to present a case"); Meyers v. Contra Costa County Department of Social Services, Slip Opinion (9th Cir. March 16, 1987) (social worker has absolute immunity from Section 1983 claims for actions "in the initiation of dependency proceedings" including "supervising an investigation"); Mazor v. Shelton, 637 F. Supp. 330, 332, 335 (N.D. Cal. 1986) (social worker absolutely immune under Section 1983 for acts that included interviewing a child and reporting his statements to the local sheriff).

The same fate must befall plaintiffs' third cause of action, which purports to set up a claim for conspiracy to violate plaintiffs' civil rights.[10] To the extent the claim

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[10]CII does not understand plaintiffs' second cause of action to allege a conspiracy to violate state law. There is no California cause of action for conspiracy. 4 B. Witkin, Summary of California Law, Torts § 31 at 2330-31 (8th ed. 1974). And, in any event, such a claim would be subject to the express immunity established by the Child Abuse Reporting Law.

asserts that CII was acting under color of state law because it was assisting the District Attorney, CII would be immune from suit under the Imbler doctrine. To the extent that plaintiffs are alleging that CII "conspired" in its private capacity and not under color of law, the claim fares no better. Under 42 U.S.C. Section 1985, the statute creating liability for civil rights conspiracies, a private conspiracy is not actionable unless it is motivated by "racial or other 'invidiously discriminatory animus.'" Ashelman v. Pope, 769 F.2d 1360, 1363 n. 5 (9th Cir. 1985), quoting Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971). Plaintiffs have not and cannot allege racial discrimination.

## V. PLAINTIFFS' RICO CLAIM ALLEGES NO FACTS AND THEREFORE STATES NO CAUSE OF ACTION

Plaintiffs' fifth cause of action is purportedly brought under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq. Plaintiffs allege that "each of the Defendants engaged in a pattern of racketeering activity . . . in violation of 18 U.S.C. Section 1962 [sic]" (Amended Complaint ¶ 53.) This Court has twice sustained demurrers to this cause of action, the second time without leave to amend.[11] These rulings in favor of the ABC Television defendants were based on the following deficiencies:

> "First, because RICO was enacted to protect legitimate business from infiltration by organized crime

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[11] See Minute Orders dated February 9, 1987 and March 30, 1987, copies of which are attached as Exhibit C.

(see United States v. Turkette, 452 U.S. 576, 594 (1981)), a RICO plaintiff is required to plead and prove that the defendant engaged in racketeering through the conduct of an ostensibly legitimate business enterprise. See Sun Savings and Loan Ass'n v. Dierdorff, Slip Opinion No. 86-5811 (9th Cir. August 7, 1987). Here, all that plaintiffs plead is some mythical organization denominated the "McMartin Preschool Controversy" (First Amended Complaint ¶ 31.) This is plainly insufficient since the "enterprise" requirement may not be provided by vague allegations sounding of conspiracy. To the contrary, a RICO plaintiff must plead and prove that the RICO enterprise had an "ascertainable structure distinct from that inherent in the conduct of [the] pattern of racketeering [charged]." United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir. 1982), cert. denied, 459 U.S. 1040 (1983); see In re National Mortgage Equity Corp. Mortgage Pool Certificate Securities Litigation, 636 F. Supp. 1138, 1160 (C.D. Cal. 1986).

Second, plaintiffs have failed to satisfy the equally rigorous requirement of pleading predicate acts. Racketeering activity actionable under RICO can only consist of acts "indictable under several provisions of Title 18 of the United States Code, see U.S.C. § 1961." Sun Savings, at 6. Section 1961 makes no reference to "leaking" information to a television reporter or any of the other conduct alleged in the first amended complaint. Indeed, the only conduct constituting a substantive criminal offense mentioned in the complaint is "obstruction of justice." But the justice allegedly obstructed was a state court criminal proceeding, hardly a basis for implicating 18 U.S.C. § 1503, the federal obstruction of justice statute, which requires conduct relating to a federal

proceeding. E.g., United States v. Baker, 494 F.2d 1262, 1265 (9th Cir. 1974).

Third, plaintiffs have yet to plead facts showing the requisite "pattern" of racketeering activity, which must consist of both "continuity" and "relatedness." See, e.g., Allington v. Carpenter, 619 F. Supp. 474, 477 (C.D. Cal. 1985). "To show continuity of racketeering activity, . . . the predicate acts must have occurred in different criminal episodes." 619 F. Supp. at 478. "The relatedness of the predicate acts is established through proof of common perpetrators, common methods of commission, or common victims." 619 F. Supp. at 477-78. None of the requisite facts to meet these pleading burdens are provided by plaintiffs' complaint.

These deficiencies were determined fatal to plaintiffs' RICO claims as against the ABC Television defendants. There being no basis for distinguishing CII, the same result should befall the amended complaint here.

## VI. PLAINTIFFS' FOURTH CAUSE OF ACTION, STYLED A CLAIM FOR "DECLARATORY RELIEF," FAILS TO STATE A CAUSE OF ACTION

Plaintiffs' fourth cause of action, brought against all defendants, alleges that plaintiffs have been sued in unspecified lawsuits by "numerous parents" of children who attended the McMartin Preschool. Plaintiffs allege that they have "been required to expend funds and effort to defend [such suits] which allege that Plaintiff is responsible for the traumas, emotional distress, sexual damage and other emotional harms suffered by

complainants' children . . . ." (Amended Complaint ¶ 26.) Plaintiffs then purport to seek indemnity from CII and the other defendants for plaintiffs' liability to the parents. (Id. ¶ 27.) Plaintiffs also seek "a declaration of this court of [the] respective rights, duties and liabilities of Plaintiff and Defendants with regard to complainants' claims, and indemnity." (Id. ¶ 28.)[12]

Plaintiffs' fourth cause of action is nearly unintelligible. No facts are alleged to suggest how CII could possibly be responsible for the "sexual damage" and "traumas" suffered by children at the McMartin Preschool. Equitable indemnity relates only to an apportionment of responsibility among tort-feasors jointly liable for the injured party's loss. See, e.g., Bear Creek Planning Committee v. Title Insurance & Trust Co., 164 Cal. App. 3d 1227, 1238 (1985). Plaintiffs plead no facts showing that CII was a joint tort-feasor with plaintiffs.

The only conduct alleged on CII's part is the making of allegedly erroneous child abuse reports to the District Attorney. For the reasons set forth elsewhere in this memorandum, plaintiffs' attempt to circumvent the absolute privileges of Penal Code Section 11172, Civil Code Section 47(2) and federal law by framing their cause of action as one for "indemnity" and "declaratory relief" should not be countenanced. No amendment is possible that could cure plaintiffs' pleading because the cause of action they propose simply does not exist. Accordingly, CII's demurrer to the fourth cause of action must be sustained without leave to amend.

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[12]The ABC defendants' demurrer to the identical count in the McMartin complaint was also sustained without leave to amend by this Court on March 30, 1987.

VII. CONCLUSION

For the reasons stated herein, the demurrers of defendants Children's Institute International and Kathleen MacFarlane should be granted without leave to amend.

DATED: _____, 1990

Respectfully submitted,

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